United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7341

United States Court of Appeals
For the Second Circuit

CLYDE C. CUTNER, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

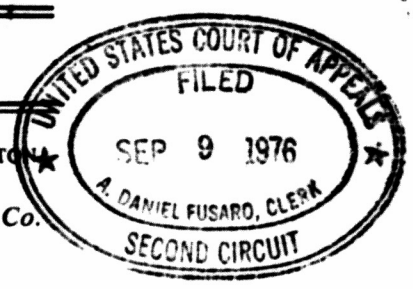
against

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX



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Docket Entries

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE [illegible]

Jury demand date:

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D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
CLYDE H. CUTNER, Individually and on behalf of all others similarly situated Plaintiff ALBERT FRIED, JR. ALBERT FRIED & CO. AND ALBERT FRIED, JR. ALBERT FRIED & CO. AND THE NEW YORK STOCK EXCHANGE, INC. Defendants	For plaintiff: MIBERG & WEISS 2 Pennsylvania Plaza New York, N.Y. 10001 BR.9-6950 For defendant: Cleary, Gottlieb, Steen & Hamilton(I One State Street Plaza & Fried, & New York, N.Y. 10004 344-0600. Milbank Tweed, Hadley & McCloy One Chase Manhattan Plaza, N.Y. 10(422-2660

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed E	Clerk		1/2/73	Mailed	15 —	
			1/16/73	U.S. Treas.		15 —
			2/15/74	Cleary	5 —	
J.S. 6 mailed ✓	Marshal		2/18/74	Cleary		5 —
			2/25/74	Milbank	5 —	
Basis of Action: SEC Act of 1934	Docket fee		3/6/74	Treas		5 —

...r. etal vs. Albert Fried, Jr. etal

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	PROCEEDINGS	Date O. Judgm.
1-73	Filed complaint & issued summons.	
1-73	Filed Summons with marshals return: ~~Served~~.	
	Albert Fried, Jr. on 1-29-73 UNABLE TO SERVE	
	" " & Co. " 1-29-73. UNABLE TO SERVE	
	Served: N.Y. Stock Exchange " 1-19-73.	
Feb.15-73	Filed stip & order that time of deft. N.Y. Stock Exchange to answer, is ext. from 2-8-73 to 2-28-73. So ordered. MacMahon, J.	
Feb.13-73	Filed deft's A.Fried,Jr, & Albert Fried & Co. attorneys notice of appearance .	
Feb.27-73	FILED ANSWER to complaint by deft's Fried, Jr. & Fried & Co.	C,G,
Mar.6- 73	Filed stip & order that time of deft. N.Y. Stock Exchange Inn. to answer is ext. from 2-28-73 to 3-7-73. So ordered. MacMahon,J.	
Mar.6-73	Filed stip & order that pltff's time to move pursuant to rule 23, F.R.C.P. is ext. to 4-12-73. So ordered. MacMahon,J.	
Mar.8-73	Filed ANSWER to complaint by N.Y. Stock Exchange.	
Mar.12-73	Filed summons & complaint with marshals return, Served:	
	Albert Fried & Co. on 2-7-73.	
	Albert Fried , Jr. on 2-7-73.	
Mar 20-73	Filed Pltffs Interrogatories to deft's Albert Fried,Jr. & Albert Fried & Co.	
Mar 26-73	Filed deft's Albert Fried, Jr. & Albert Fried & Co,s Interrogatories. addressed tothe pltff.	
Mar 27-73	Filed Pltffs request to Inspect Documents.	
Mar 27-73	Filed Pltffs request to deft. N.Y. Stock Exchange, Inc. to Inspect &copy Documents	
Mar 27-73	Filed Pltff's Interrogatories to deft N.Y. Stock Exchange (set # 1)	
Apr13-73	Filed pltff's memorandum insupport of motinn for class action determinat	
Apr13-73	Filed pltff's notice of motion for class determination ret: 4-27-73.	
Apr 24-73	Filed stip and order that defts Albert Fried Jr. & Albert Fried & Co, & the N.Y. Stock Exchange shall personally serve on counsel for pltff. their answers to pltffs first set of Imterrogatories before 4/30/73; So Ordered Mac Mahon J.	
May 1-73	Filed stip and order that the time for defts Albert Fried, Jr. & Albert Fried & Co. to serve answers to pltffs first set of Interrogatories is extended to 5/7/73. So Ordered Mac Mahon J.	
May8-73	Filed pltff's answers and objections to interrogs. propounded by defts Albert Fried,Jr. and Albert Fried & Co.	
May 9-73	Filed stip and order that the time for deft. N.Y. Stock Exchange to answer pltffs Interrogatories is extended to 5/9/73, So Ordered Mac Mahon J.	
May 10-73	Filed deft. New York Stock Exchange, Inc's answer to pltffs Interrogatories.	
May 10-73	Filed deft. New York Stock Exchange Inc's objections to pltffs Interrogatories.	
May 8-73	Filed defts Albert Fried Jr. & Albert Fried & Co's answers to pltffs Interrogatories	
May 15-73	Filed deft. Albert Fried Jr. & Albert Fried & Co's response to pltffs request for the Production of documents.	
May 16-73	Filed defts S.E.C's responses to pltff's rule 34 request.	
May 16-73	Filed deft S.E.C.'s objections to pltffs rule 34 request.	
May 18-73	Filed stip and order that the time for the deft. to serve counsel for the pltff. any papers on opposition to pltff's motion for a class action is extended to 5/29/73. So Ordered Mac Mahon J.	
6-4-73	Filed deft's. New York Stock Exchange notice of motion ret: on June 15,1973.	
6-4-73	Filed memorandum in support of motions to dismiss portions of the complaint and in opposition to pltf's. motion for class action determination.(deft's.N.Y.Stock Exchange).	
Jun 4-73	Filed stip and order that the defts' time to serve papers in response to pltffs class action motion is extended to 6/1/73, also pltff will serve repyl papers by 6/12/73. So Ordered Mac Mahon J.	

CIVIL DOCKET VS ALBERT FRIED, JR. et al PAGE 2 JUDGE MAC MAHON 73 CIVIL 227

DATE	PROCEEDINGS	AMOUNT REQUIRED IN EMOLUMENT RETURNS
Jun 19-73	Filed pltff's reply memo in support of motion for class action determination.	
Jun 19-73	Filed pltff's memo contra motion to dismiss portions of the complaint.	
Jun 12-73	Filed stip and order that the time for the pltff. to personally serve defts any reply papers on his motion for a class action determination is extedned to 6/19/73, So Ordered Mac Mahon J.	
Jun 26-73	Filed stip and order that pltff's mption is extended to 7/6/73, that the return of defts motion is extended to 7/6/73, So Ordered Mac Mahon J.	
Jul 6-73	Filed defts' answering memo in opposition to motion for a class action determination	
Mar. 13-74	Filed memo endorsed on deft's (NY Stock Exchange) motion filed 6-4-73--Motion granted. See opinion of this date--MacMahon, J.	
Mar. 13-74	Filed memo endorsed on motion by pltff. filed 4-13-73--Motion granted. See opinion of this date--MacMahon, J.	
Mar. 13-74	Filed OPINION #40,448--Pltff. is directed to give individual notice of this action to all members of the class who can be identified through reasonable effort. Notice by mail is the best method..The form of notice, as set forth in Katz v. Carte Blanche Corp. 53 F.R.D. 539 (W.D.Pa. 1971), shall be submitted to the Court for approval on or before 4-1-74--Accordingly, defts' motion to dismiss Counts IV and V of the complaint is granted. Pltff's motion for a class determination is granted. Notice to the above defined class shall be given by pltff., and he shall bear the cost of said notice-So ordered-MacMahon, J.-m.n.	
Apr.9-74	Filed Order that proposed notice annexed hereto is approved. MacMAHON J. (n/m)	
Apr.12-74	Filed notice of appeal by defts' Albert Fried, Jr. and Albert Fried & Co., from order entered on March 13-74, and from so much of said orders as granted plainfiff's motion for a class determination pursuant to Rule 23(c) (1), FRCP. m/n.	
Apr.12-74	Filed notice of appeal by deft. New York Stock Exchange, Inc. from order entered on March 13-74, and from so much of said order as granted plainitff's motion for a class determination pursuant to Rule 23(c) (1),FRCP. m/n.	
Apr.19-74	Filed pltfs. notice of motion for reargument and modification of order filed 4-9-74.	
Apr.19-74	Filed pltfs. memo in support of motion for reargument.	
Apr.25-74	Filed deft Fried's memo in opposition to motion for reargument.	
May 8-74	Filed pltfs. reply memo.	
May 7-74	Filed memo end. on pltfs. motion filed 4-19-74. The within motion for reargument is granted; and, upon reargument, the court adheres to its order of 4-9-74. ***. So Ordered. MacMAHON,J. (n/m)	
Jun.5-74	Filed pltffs reply memo in support of motion for reargument.	
Jul.8-74	Filed True Copy of Order from USCA of stipulation for dismissal of appeal. Clerk	

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5-17-75	Filed notice to docket clerk that the action has been transmitted to USCA on 5-17-75	
7-17-75	Filed deft (N.Y. Stock Exchange) affdvt & notice of motion to decertify the action as a class action. Ret. 8-1-75	
7-17-75	Filed defts memo in support of motion to decertify action & strike class action allegations from the complt.	
8-4-75	Filed Stip & Order adjourning to 8-15-75 defts motion to decertify action as a class action. Pltffs papers in answer to be served by 8-6 & defts reply papers served by 8-14-75.....MAC MAHON,J	
8-7-75	Filed pltffs affdvt in opposition to defts motion decertifying action as a class action.	
8-15-75	Filed Deft. NY Stock Exc's reply affdvt in supportof motion to decertify Class Actio	
9-29-75	Filed Memo-End on motion of 7-17-75. The within motion is denied witho prejudice to renew within 30 days upon a showing that, in the interim, pltff has failed to take steps to prosecute this suit diligently.....So Ordered, MAC MAHON,J m/n	
10-30-75	Filed deft (Stock Exchange) affdvt & notice of motion to decertify action as a class action. Ret. 11-14-75	
10-30-75	Filed defts memo of law in support of motion to decertify action & strike class action allegations from the complt.	
10-31-75	Filed pltffs notice to take deposition of defts (Albert Fried, Albert Fried & Co., & N.Y.Stock Exchange).	
11-10-75	Filed pltffs affdvt in opposition to defts motion to dismiss.	
11-12-75	Filed defts affdvt, notice of motion & Rule 9(f) statement for a protective order. Ret. 11-14-75	
11-12-75	Filed defts memo in support of motion for a protective order.	
11-14-75	Filed deft (N.Y. Stock Exchange)reply affdvt to affdvt of (Melvyn I. Weiss) re motion to dismiss.	
11-14-75	Filed deft (Fried & Fried & Co.) reply affdvt re endorsement on defts motion to decertify action as a class action.	
11-20-75	Filed Endorsement & Order on motion of 11-12-75. Defts move for a protective order to defer taking of depositions by pltff. Sinc defts motion to decertify the class & strike the class actions allegations from the complt was granted, all that remains of th suit is the claim for relief on behalf of the named pltff indi there is no basis for defts fear & no reason to defer the taki of the depositions. The motion is denied.....MAC MAHON,J m/ ///// Con't on Page #4	

CLYDE H. CUTNER -v- ALBERT FRIED, et al — 73 Civ 227
Page #4 — MAC MAHON,J

DATE	PROCEEDINGS
11-25-75	Filed Memorandum-Decision #43441. Pltff having done nothing at all to prosecute this suit since the class action determinat was made more than 18 months ago, defts motion for an order pursuant to Rule 23(c)(1), FRCP, determining that this actio shall no longer proceed as a class action is granted. All class action allegations shall be striken from the complt, & this action shall continue solely on behalf of the named pltff individually. Pltff is directed to serve & file an amended complt, consistent with the foregoing within 20 days.....SO ORDERED, MAC MAHON,J m/n
11-25-75	Filed Memo-End. on motion of 10-30-75. See memorandum-decision of this date granting the within motion.....MAC MAHON,J m/n
3-2-76	Filed pltffs affdvt & notice of motion permitting a late filing of an amended complt. Ret. 3-12-76
3-2-76	Filed pltffs memo of law in support of motion for permission to file amended complt.
3-10-76	Filed defts (Albert Fried & A F. Co. affdvt in opposition to pltffs motion to file an amended complt.
3-10-76	Filed defts memo in opposition to pltffs motion to file an amended complt.
6-18-76	Filed Memo-End. on motion dtd 3-2-76. See opinion of this date denying the within motion & dismissing this action with prejudic pursuant to Rule 41(b) Fed.R.Civ.P.....MAC MAHON,J. n/m
6-18-76	Filed Opinion #44603 & Order. For the reasons indicated, the pltffs motion for an order permitting the late filing of an amended complt is denied. The action is hereby dismissed with prejudic pursuant to Rule 41(b), Fed.R.Civ.P., for failure to prosecute & to comply with the order of this court.....So Ordered, MAC MAHON,J. n/m
7-15-76	Filed notice of appeal to the Usca of Clyde Cutner from order entere On June 18,1976 by J. MacMahon (m/n)
7-15-76	Filed bond for undertaking of coxts on appeal in the amt. of $250.00 (Fidelity and Deposit Co.)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER,

Plaintiff,

- against -

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

73 Civ. 227(LFM)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Clyde H. Cutner, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order dated and entered June 18, 1976 which denied plaintiff's motion for an Order permitting the late filing of an amended complaint and dismissed with prejudice the action herein for failure to prosecute and for failure to comply with the Order of the Court as to the time within which an amended complaint could be filed.

Attached hereto as Exhibit A are the names and addresses of the attorneys of record for each party.

Dated: New York, New York
July 14, 1976

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Attorenys for the New York Stock
Exchange, Inc.,
One Chase Manhattan Plaza
New York, New York 10005

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

CLYDE H. CUTNER
Individually and on behalf of all others similarly situated

Plaintiff,

- against -

ALBERT FRIED, JR.
ALBERT FRIED & CO.

and

THE NEW YORK STOCK EXCHANGE, INC.

Defendants.

73 Civ. 227

COMPLAINT
CLASS ACTION

JURY TRIAL DEMANDED

- x

COUNT I

Jurisdiction, Venue And Nature Of Action

1. This Court has jurisdiction of this action under Section 27 of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, 15 U.S.C. §78aa, and 28 U.S.C. §§ 1332 and 1337.

2. Plaintiff brings this action under and pursuant to Sections 10(b) and 11(b) of the Exchange Act, 15 U.S.C. §78j(b) and 78k(b), respectively, and Rules 10b-5 and 11b-1 (17 C.F.R. 240.10b-5, 17 C.F.R. 240.11b-1, respectively),

promulgated pursuant to Sections 10(b), 11(b) and 23(a) of the Exchange Act (15 U.S.C. §§78j, 78k and 78w, respectively).

3. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of costs and interest.

4. Venue is proper in this judicial district under Section 27 of the Exchange Act, 15 U.S.C. §78aa and 28 U.S.C. §§1391(b) and (d).

5. Plaintiff Clyde H. Cutner is an individual citizen of the Commonwealth of Pennsylvania residing at 226 S. Rittenhouse Square, Philadelphia, Pennsylvania and on December 22, 1972 was the beneficial and record owner of 4100 and 3400 shares, respectively, of Skyline Corporation.

6. Plaintiff brings this action on behalf and as representative of the class as defined below.

7. Defendant Albert Fried, Jr., (hereinafter Fried) is an individual citizen of the State of New York, engaged in business as a stockbroker at 91 Hudson Street, New York, New York, is a member of the New York Stock Exchange, and is registered therewith as the "Specialist" in Skyline Corporation market trading.

8. A "registered specialist" is one authorized by a national stock exchange with which he is registered to perform two basic functions with respect to his specialty stocks: As a broker, he executes orders forwarded to him by other exchange members, which are noted in his specialist "book" and for which he receives a part of the total commission paid by customers for the execution of their orders; as a dealer, he buys and sells for his own account for the purpose of providing reasonable price continuity from transaction to transaction by evening out temporary disparities between public supply and demand.

9. Defendant Albert Fried & Co. (hereinafter Fried Company), a stock brokerage firm with its principal place of business at 91 Hudson Street, New York, New York, employs defendant Fried in his capacity as Specialist and is the registered specialist firm in Skyline Corporation market trading on the New York Stock Exchange.

10. Defendant New York Stock Exchange (hereinafter NYSE) is a New York not-for-profit corporation and is a "registered national securities exchange" as defined by §6(d) of the Securities Exchange Act of 1934, 15 U.S.C. §78f(d), with its principal place of business at 11 Wall Street, New York, New York.

11. Skyline Corporation is a corporation engaged in the business of manufacturing and selling mobile homes and related products. Its shares are listed and traded on the NYSE.

12. Defendants, in connection with the unlawful acts, conduct and conspiracy charged herein, directly or indirectly, used the means and instrumentalities of interstate commerce and of the mails and the facilities of a national stock exchange.

Class Action Allegations

13. This suit is properly maintained as a class action under Rules 23(b)(1)(A) and (B) and 23(b)(3) of the Federal Rules of Civil Procedure.

14. The plaintiff class consists of all individuals, firms, partnerships, corporations and other entities other than defendants who owned shares in Skyline Corporation at 12:11 p.m. Friday, December 22, 1972 and who suffered damage as a result of defendants' acts conduct, combination and conspiracy hereinafter alleged.

15. The number of members of the class is not presently known to plaintiff but is believed to exceed 11,000.

16. Plaintiff is an adequate representative of the class because his interest is the same as all members thereof, he will fairly and adequately protect the interests thereof and he is represented by able counsel experienced in class actions brought under the securities and other federal laws.

17. The defendants are citizens of the Southern District of New York and the actions by defendants constituting the violations hereinafter alleged took place in The Southern District of New York, making concentration of the litigation in this forum desirable.

18. The interest in the litigation is common to all members of the plaintiff class and all members are capable of identification and direct notice through Skyline Corporation and defendant Fried Company.

19. The questions of fact and law common to the members of the plaintiff class include, among others, the following:

(a) Whether defendants engaged in acts and conduct in violation of Sections 10(b) and 11(b) of the Exchange Act, Rules 10b-5 and 11b-1 promulgated thereunder and Rule 104 of the NYSE.

(b) Whether the acts of defendants constituted a manipulative device, in violation Section 10(b)

of the Exchange Act and of Rule 10b-5 promulgated thereunder.

(c) Whether defendant NYSE established adequate rules in its governance of Specialists as mandated by Rule 11b-1(a)(2).

(d) Whether defendants were negligent in the discharge of the legal duties and obligations, relating to regulating the trading market in Skyline, owed to plaintiff and to each member of plaintiff case.

20. The aforesaid questions of law and fact are common to the class, predominate over questions affecting individual members, and a class action is superior to others methods for the fair and efficient adjudication of the controversy since the class is so numerous that joinder of all members is impracticable.

Violations Alleged

21. Shares in Skyline Corporation were traded on defendant NYSE throughout 1972 until December 22, 1972 at prices varying between a high of $74 and a low of $41 1/4 per share.

22. Plaintiff is informed and believes and therefore avers that at all relevant times Skyline Corporation has been and remains a financially sound corporation making a

quality product, with good prospects for the future.

23. During the course of the morning of December 22, 1972, approximately 8,100 shares in Skyline Corporation were traded at approximately $48 per share.

24. At noon on December 22, 1972 a report of quarterly earnings by Skyline Corporation was published nationally on news wire services which showed earnings per share down slightly from the previous year for the quarter, but up slightly for the half-year.

25. With no further shares having been traded, at 12:11 p.m. on December 22, 1972, defendants in collaboration with each other and in their respective official capacities, stopped further trading in shares of Skyline Corporation.

26. The aforesaid closing of trading in such shares was done by defendants without justification and in breach of their duties imposed by the Exchange Act and the Regulations thereunder.

27. No further trading in shares of Skyline Corporation was permitted by defendants until 1:10 p.m. Tuesday, December 26, 1972.

28. During the period from noon December 22, 1972 to

1:10 p.m. December 26, 1972, defendant Fried, the agents and employees of defendants Fried and Fried Company, the Floor Governor and Board of Governors and other agents and/or officials of defendant NYSE, and all of them, conspired to and did engage in acts, transactions, practices and courses of business which operated as a fraud and deceit upon plaintiff and the members of the class he represents, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading to plaintiff and plaintiff class utilizing the facilities of defendant NYSE, the national wire services and other instrumentalities of Interstate Commerce in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as is more fully set forth below.

29. In connection with the stopping of trading on December 22, 1972, defendants, each of whom is sued both individually and as a co-conspirator, falsely represented that the influx of sell orders was of such volume as to necessitate closing the said market, which representation was untrue and operated as a fraud and deceit upon the shareholders of Skyline Corporation.

30. The act of stopping trading in the said shares

operated as a fraud and deceit upon plaintiff and the class in that that act operated as a false and misleading representation that the value of shares had been substantially reduced as a result of lower quarterly earnings.

31. Defendants conspired to and did falsely represent and state to the public, utilizing the facilities of defendant NYSE, interstate news wire services, and various newspapers and reports mailed interstate, that the fair market value of shares in Skyline Corporation had been reduced by $14 and that the true sale price for its shares was $34.

32. In fact, defendants Fried and Fried Company had orders on their books to buy at substantially higher prices.

33. The act of resuming trading in Skyline Corporation shares at 1:10 p.m. December 26, 1972, at a price of $34, operated as a fraud and deceit upon plaintiff and the plaintiff class in that it operated as a false and misleading representation that there had been sufficient time for the market to absorb, assess and recover from the implications and representations made by defendants in stopping trading, and further operated as a false and misleading representation that $34 was the highest price obtainable for the shares of Skyline Corporation.

34. Defendants conspired to and did omit to state the following material facts which were necessary in order to make the acts and statements of defendants not misleading to plaintiff and plaintiff class:

(a) that at the time trading was halted the Specialist's books carried buy orders at prices higher than $34, which orders were not filled at prices higher than $34;

(b) that the alleged influx of sell orders was of much lesser volume than experienced on occasions when trading was not stopped;

(c) that the stopping of trading was due to the failure of defendants Fried and Fried Company to properly perform the duties imposed upon them as Specialist and was not due to emergency conditions in the market or to material conditions intrinsic to Skyline;

(d) that only 75,000 Skyline shares were matched by the Specialist during the time in which trading was halted.

35. As a result of the aforesaid acts, conduct, combination and conspiracy, plaintiff and members of plaintiff class have been forced to sell Skyline shares at a depressed price and, in order to retain their investment held in margin or maintenance accounts, they have had to borrow money at interest and/or take money out of

income producing accounts and investments. They have thereby been damaged in an amount not presently ascertainable by plaintiff.

WHEREFORE, plaintiff demands that the Court:

A. Enter judgment against defendants and in favor of plaintiff and each member of plaintiff class in the amount of damages determined to have been sustained by such persons, together with costs of suit, including a reasonable counsel fee; and

B. Grant such other and further relief as is just, necessary and proper.

COUNT II

36. Plaintiff incorporates by reference herein Paragraphs 1 through 35 hereof.

37. The aforesaid acts and practices by defendants had the purpose and effect of pegging or fixing the price for shares in Skyline Corporation substantially lower than the available market for Skyline Corporation shares.

38. The aforesaid stabilizing was itself a manipulative device and was initiated at the price of $34 by defendants at a time when defendants knew or had reason to know that the said price was the result of activity which was fraudulent, manipulative and deceptive

as above described, all in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

WHEREFORE, plaintiff demands the same relief as that demanded in Count I hereof.

COUNT III

39. Defendants in this Count are Fried and Fried Company.

40. Plaintiffs incorporate by reference herein Paragraphs 1 through 38 hereof.

41. The Rules of the NYSE, especially Rule 104, impose upon defendants as Specialists a duty to maintain a fair and orderly market and to minimize the effects of temporary disparities between supply and demand.

42. Defendants' actions as above-described, are in violation of the requirements of Rule 104 of the NYSE, were calculated to, and did, maximize the effects of any temporary disruption in supply of and demand for shares in Skyline Corporation.

WHEREFORE, plaintiff demands judgment against defendant Fried and Fried Company and in favor of plaintiff and each member of plaintiff class in a like amount to that demanded in Count I hereof.

COUNT IV

43. Plaintiff incorporates by reference herein Paragraphs 1 through 9, 11 and 13 through 38 hereof.

44. Defendant in this Count is NYSE.

45. Defendant NYSE failed and refused to establish adequate rules in its governance of Specialists as mandated by Rule 11b-1(a)(2).

46. The damages sustained by plaintiff and plaintiff class are the direct result of such failure and refusal.

WHEREFORE, plaintiff demands judgment against defendant NYSE and in favor of plaintiff and each member of plaintiff class in a like amount to that demanded in Count I hereof.

COUNT V

47. Plaintiff incorporates by reference herein Paragraphs 3, 5 through 11, 13 through 27, 35, 41 and 45 through 46.

48. Jurisdiction is based upon diversity of citizenship and pendent jurisdiction. Venue is proper pursuant to 28 U.S.C. §§1391 (b) and (d).

49. The aforesaid acts and conduct of defendants were negligent and grossly negligent.

WHEREFORE, plaintiff demands the same relief as that demanded in Count I hereof.

MILBERG & WEISS

By _____
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New York, New York 10001

HAROLD E. KOHN, P.A., ATTORNEYS AT LAW

By _____
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STUART H. SAVETT
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Philadelphia, Pennsylvania
19103
Attorneys for Plaintiff

Answer of Defendants
Albert Fried, Jr. and
Albert Fried & Co.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2/27/73

- - - - - - - - - - - - - - - - - - - -x

CLYDE H. CUTNER
Individually and on behalf of all others similarly situated

Plaintiff,

-against-

ALBERT FRIED, JR.
ALBERT FRIED & CO.

and

THE NEW YORK STOCK EXCHANGE, INC.

Defendants.

- - - - - - - - - - - - - - - - - - - -x

73 Civ. 227
(LFM)

ANSWER

ALBERT FRIED, JR. and ALBERT FRIED & CO., defendants, by their attorneys, Cleary, Gottlieb, Steen & Hamilton, answer the complaint herein as follows:

1. Admit the existence of the provisions of law cited in paragraph 1 of the complaint, and deny each and every other allegation thereof.

2. Admit the allegations of paragraphs 2, 10, 21 and 39 of the complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3, 5, 6, 13, 14, 15, 16, 19, 20, 22 and 35 of the complaint.

4. Deny each and every allegation of paragraph 4 of the complaint, except admit that if this Court has jurisdiction as alleged in paragraph 1 of the complaint, venue would be proper.

5. Admit the allegations of paragraph 7 of the complaint except deny that Albert Fried, Jr. ("Fried") is engaged in business at 91 Hudson Street and the implication

that Fried is the only person registered with the New York Stock Exchange, Inc. ("NYSE") as a Specialist in Skyline Corporation ("Skyline") market trading.

6. Admit the allegations of paragraph 8 of the complaint, but only as a general statement and not as a legal or complete description of a Specialist.

7. Admit the allegations of paragraph 9 of the complaint, except deny that Albert Fried & Co. ("Fried Company") has its principal place of business at 91 Hudson Street and that it is the "registered specialist firm" in Skyline market trading on the NYSE.

8. Admit the allegations of paragraph 11 of the complaint, except deny that they constitute a complete description of the business of Skyline.

9. Deny each and every allegation of paragraphs 12, 26, 28, 29, 30, 31, 32, 33, 34, 37, 38, 42 and 49 of the complaint.

10. Deny that they committed any violations and refer to the answers to specific paragraphs of the complaint with respect to what actions defendants took, and admit the other allegations of paragraph 17 of the complaint.

11. Deny that all members of the alleged class are capable of identification and direct notice through Fried Company and deny knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 18 of the complaint.

12. Deny each and every allegation of paragraph 23 of the complaint except admit that approximately 8,100 shares of Skyline were traded on the floor of the NYSE on December 22, 1972 and allege that the shares were traded in a range of $49 7/8 to $47 1/2, which was the price of the last trade.

13. Deny each and every allegation of paragraph 24 of the complaint except admit that a report (or reports) of quarterly earnings of Skyline was published in one or more media shortly after noon on December 22, 1972, and refer to the report (or reports) for the content thereof.

14. Admit that trading in shares of Skyline was stopped shortly after noon on December 22, 1972, and deny each and every other allegation of paragraph 25.

15. Admit that trading in shares of Skyline was not resumed until 1:10 p.m. on December 26, 1972 (the next business day following December 22), and deny each and every other allegation of paragraph 27 of the complaint.

16. With respect to the allegations of paragraph 36 of the complaint, defendants repeat, reallege and incorporate herein by reference their answers to paragraphs 1 through 35 of the complaint.

17. With respect to the allegations of paragraph 40 of the complaint, defendants repeat, reallege and incorporate herein by reference their answers to paragraphs 1 through 38 of the complaint.

18. Deny the allegations of paragraph 41 of the complaint and refer instead to the text of Rule 104 of the NYSE and to the text of whatever other Rules of the NYSE plaintiff may have reference to for the content thereof.

19. With respect to paragraphs 43 through 46 of the complaint, defendants Fried and Fried Company do not answer, since paragraph 44 thereof alleges that they are not named as defendants with respect to Count IV.

20. With respect to the allegations of paragraph 47 of the complaint, defendants repeat, reallege and incorporate herein by reference their answers to

paragraphs 3, 5 through 11, 13 through 27, 35 and 41 of the complaint, and deny each and every allegation of paragraphs 45 and 46 of the complaint.

21. With respect to the allegations of paragraph 48 of the complaint, deny knowledge or information sufficient to form a belief as to the existence of diversity of citizenship or pendent jurisdiction and deny that venue is proper, except admit that if this Court has jurisdiction, venue would be proper.

FIRST AFFIRMATIVE DEFENSE

22. The complaint fails to state a claim against Fried or Fried Company upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

23. Fried and Fried Company acted in good faith and in conformity with all applicable Federal laws and rules and regulations of the Securities and Exchange Commission ("SEC") and the NYSE, and the complained of cessation and resumption of trading, and all of defendants' acts related thereto, were duly approved by the NYSE and its duly authorized officers and agents in accordance with said laws, rules and regulations.

THIRD AFFIRMATIVE DEFENSE

24. Plaintiff alleges in paragraphs 45, 46 and 47 that his losses and those of the class which he purports to represent are the direct result of the failure and refusal of the NYSE to establish adequate rules in its governance of Specialists as mandated by 17 C.F.R. 240.11b-1(a)(2).

25. Neither Fried nor Fried Company has any responsibility for the establishment of the rules referred to in paragraph 24 hereof.

FOURTH AFFIRMATIVE DEFENSE

26. Primary jurisdiction over the subject matter of this action insofar as it relates to the adequacy of rules established by the NYSE in its governance of Specialists is vested in the SEC under the provisions of the Securities Exchange Act of 1934 (15 U.S.C. §§78a et seq.) and more particularly Section 19 thereof, (15 U.S.C. §78s).

27. The issues of fact and law alleged in all counts of the complaint are common to those which relate to the allegations with respect to the inadequacy of rules promulgated by the NYSE in its governance of Specialists and should not be litigated separately in a piecemeal manner.

FIFTH AFFIRMATIVE DEFENSE

28. On information and belief, plaintiff has failed to exhaust his administrative remedies in seeking a determination of whether the rules of the NYSE for the governance of Specialists are adequate, in the manner provided for pursuant to the Securities Exchange Act of 1934 (15 U.S.C. §78a) and the rules of the SEC promulgated thereunder and pursuant to the Administrative Procedure Act, 5 U.S.C. §§500 et seq., and in particular 5 U.S.C. §§553(e), 555 and 706.

SIXTH AFFIRMATIVE DEFENSE

29. Pursuant to the Securities Exchange Act of 1934, (15 U.S.C. §§78a et seq.) and the rules of the SEC promulgated thereunder, in particular §§ 6(a)(4) (15 U.S.C. §78f(a)(4)) and 11b (15 U.S.C. §78k(b)) and Rule 11b-1 (17 C.F.R. 240.11b-1), the SEC must determine whether any new or amended rule of the NYSE is just and adequate to insure fair dealing and to protect investors.

30. The SEC is a necessary and indispensable party to any adjudication by this Court of the adequacy of any rule of the NYSE.

WHEREFORE, defendants Albert Fried, Jr. and Albert Fried & Co. demand judgment dismissing the complaint, or in the alternative, staying the action until plaintiff shall have exhausted his administrative remedies and the SEC shall have exercised its primary jurisdiction, or in the alternative, determining that this action cannot be maintained as a class action, together with their costs and disbursements.

Dated: New York, New York
February 27, 1973

CLEARY, GOTTLIEB, STEEN & HAMILTON

By S/ George Weiss
A Member of the Firm
Attorneys for Albert Fried, Jr.
and Albert Fried & Co.
One State Street Plaza
New York, New York 10004
(212) 344-0600

TO:

MILBERG & WEISS
Attorneys for Plaintiff
Two Pennsylvania Plaza
New York, New York 10001

MILBANK, TWEED, HADLEY & MC CLOY
Attorneys for The New York Stock Exchange, Inc.
One Chase Manhattan Plaza
New York, New York 10005

Answer of the
New York Stock Exchange, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER Individually and on behalf of all others similarly situated Plaintiff, -against- ALBERT FRIED, JR. ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC. Defendants.	73 Civ. 227 (LFM) ANSWER

Defendant New York Stock Exchange, Inc. (herein "NYSE"), by its attorneys, Milbank, Tweed, Hadley & McCloy, for its answer to the complaint:

1. Denies each and every allegation contained in paragraphs 1, 2, 3 and 4, except admits that jurisdiction and venue are alleged to exist by virtue of the designated statutes and admits that the action purports to be brought under the designated statutes and rules.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5 and 6, except admits that the action purports to be brought on behalf of a class.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7, except admits that Albert Fried, Jr. is a member of the NYSE and a registered "specialist" in Skyline Corporation (herein "Skyline").

4. Admits that the allegations contained in paragraph 8 provide a partial description of the role of a specialist and refers to the Rules of the Board of Directors of the NYSE for a more complete description of a specialist's activities.

5. Denies each and every allegation contained in paragraph 9, except admits that Albert Fried & Co. is a stock brokerage firm.

6. Denies each and every allegation contained in paragraphs 12, 13, 14, 15 and 16.

7. Denies each and every allegation contained in paragraphs 17, 18, 19 and 20.

8. Admits, on information and belief, the allegations contained in paragraph 21.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22.

10. Denies each and every allegation contained in paragraph 23, except admits that approximately 8,100 shares of Skyline were traded on the floor of the NYSE on December 22, 1972.

11. Denies each and every allegation contained in paragraph 24, except admits that a report (or reports) of quarterly earnings of Skyline was or were published in one or more media shortly after noon on December 22, 1972, and refers to the report (or reports) for the content thereof.

12. Denies each and every allegation contained in paragraphs 25, except admits that the NYSE halted trading in shares of Skyline at approximately 12:21 P.M. on December 22, 1972.

13. Denies each and every allegation contained in paragraph 26.

14. Denies each and every allegation contained in paragraph 27, except admits that trading in shares of Skyline was not resumed on the floor of the NYSE until 1:10 P.M. on the next business day following December 22, i.e., December 26, 1972.

15. Denies each and every allegation contained in paragraphs 28, 29, 30, 31, 32, 33, 34, 35, 37 and 38.

16. Denies each and every allegation contained in paragraph 41 and refers to the Rules of the Board of Directors of the NYSE for a full and complete statement of their terms.

17. Denies each and every allegation contained in paragraphs 42, 45 and 46.

18. Denies each and every allegation contained in paragraphs 48 and 49, except admits that jurisdiction purports to be based upon diversity of citizenship and pendant jurisdiction and that venue is purportedly proper pursuant to the statute designated.

FIRST PARTIAL DEFENSE

19. Insofar as the allegations of the complaint relate to the adequacy of rules established by the NYSE in its regulation of specialists, the complaint fails to state a cause of action upon which relief can be granted.

SECOND PARTIAL DEFENSE

20. The action may not be maintained as a class action.

WHEREFORE, defendant New York Stock Exchange, Inc. demands judgment dismissing the complaint with costs and disbursements.

Dated: New York, N.Y.
March 7, 1973

MILBANK, TWEED, HADLEY & McCLOY

By _____
A Member of the Firm
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

Defendants' July 1975
Notice of Motion for
an Order Decertifying the Action
as a Class Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

- x

NOTICE OF MOTION

73 Civ. 227 (L.F.M.)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of Albert Fried, Jr., sworn to May 31, 1973 and July 2, 1975 the orders of this Court dated March 13, 1974 and April 8, 1974, the undersigned will move this Court before the Honorable Lloyd F. MacMahon in Room 519 of the United States Court House, Foley Square, New York, N.Y. on August 1, 1975 at 2:15 P.M., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 23, Subdivisions (c)(1) and (d)(4), of the Federal Rules of Civil Procedure decertifying the action as a class action on the grounds that plaintiff is an inadequate representative of the class, and for such other and further relief as may seem just and proper.

Dated: New York, N.Y.
July , 1975

Yours, etc.,

MILBANK, TWEED, HADLEY & McCLOY

By Briscoe R. Smith
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

CLEARY, GOTTLIEB, STEEN &
HAMILTON

By GEORGE J. GRUMBACH, JR.
(A Member of the Firm)
1 State Street Plaza
New York, N.Y. 10004
Attorneys for Defendants
Albert Fried, Jr. and
Albert Fried & Co.

TO:

MILBERG & WEISS
1 Pennsylvania Plaza
New York, N.Y. 10001
Attorneys for Plaintiff

HAROLD E. KOHN, P.A.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
Attorneys for Plaintiff

July 2, 1975 Affidavit
of Albert Fried, Jr.
in Support of Motion
to Decertify Class Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

73 Civ. 227 (LFM)

AFFIDAVIT IN SUPPORT OF MOTION TO DECERTIFY CLASS ACTION

- -x

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ALBERT FRIED, JR., being duly sworn deposes and says:

1. I am a co-defendant in this action and a general partner of co-defendant Albert Fried & Co. I make this affidavit in support of defendants' motion to decertify the action and to strike the class action allegations from the complaint.

2. The events forming the basis for the complaint in this action involve the temporary halt in trading in the stock of Skyline Corporation between December 22 and December 26, 1972 at which time I was acting as the registered specialist in the stock of Skyline Corporation on the New

York Stock Exchange. From the dates of those events to the present, neither I nor my firm have been advised of any claim by any shareholder of Skyline Corporation of the nature asserted in this action. Neither I nor any other members of my firm are aware of any litigation or any threat of litigation involving the suspension of trading in Skyline Corporation stock between December 2[illegible] and December 26, 1972.

3. I am advised by George J. Grumbach, Jr., a partner of Cleary, Gottlieb, Ste[illegible] & Hamilton, the attorneys for Albert Fried & Co. and myself, that with the exception of written interrogatories and document requests served on defendants in March 1973, the plaintiff has conducted no discovery and that the plaintiff has failed to make any effort in over two years to prosecute this action on its merits.

Albert Fried, Jr.

Sworn to before me this
2 day of July, 1975

Carl Goodman
Notary Public

CARL GOODMAN
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Commission Expires March 30, 1976

July 31, 1973 Affidavit
of Albert Fried, Jr.
Submitted in Support of
July 1975 Notice of Motion
to Decertify Class Action,
Together with Attachments

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

CLYDE H. CUTNER, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO., AND THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

72 Civ. 227 (LFM)

AFFIDAVIT

- X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ALBERT FRIED, JR., being duly sworn, deposes and says:

1. I am a co-defendant in the above-captioned proceeding and a general partner of Albert Fried & Co., also a co-defendant therein. I make this affidavit in opposition to plaintiff's motion for class action determination and in support of defendants' motion for partial dismissal of the complaint.

2. I am a registered specialist in the stock of Skyline Corporation ("Skyline") on the New York Stock Exchange and was acting in that capacity on December 22 and 26, 1972.

3. Skyline is engaged principally in the business of producing mobile homes, recreational vehicles and sectional housing. From January 1963 until January 1969, stock in Skyline was traded on the American Stock Exchange, and since January 1969, when I became a specialist in the stock, it has traded on the floor of the New York Stock Exchange, Inc., (the "Exchange"). As it still is, during December 1969, Skyline

stock was also traded on the Midwest and Philadelphia-Baltimore-Washington stock exchanges and over-the-counter (the so-called third market).

4. On a basis adjusted for stock splits, Skyline stock traded at prices under $10 until 1968. In 1969, the stock traded between a high of $41 7/8 and a low of $25 3/4; in 1970, it traded between a high of $34 5/8 and a low of $13 5/8; in 1971, it traded between a high of $59 7/8 and a low of $27. During 1972 until December 26, 1972, the stock in Skyline traded between a high of $74 and a low of $41 1/4 (Stock in Skyline was split 2 for 1 in 1962 and again in 1964, and 3 for 1 in 1968 and again in 1969.)

5. At its 1972 peak of $74 per share, the stock was trading at a ratio of approximately 42 times its earnings for its fiscal year ended May 31, 1972.

6. Undoubtedly because of its consistently improving earnings, in recent years Skyline has been regarded as a very attractive investment by institutions. According to Standard & Poor's reports, Skyline's earnings per share, adjusted for stock splits, have been as follows (on the Company's fiscal year basis):

1964-5	1965-6	1966-7	1967-8	1968-9	1969-70	1970-1	1971-2
$0.18	$0.19	$0.20	$0.40	$0.77	$0.99	$1.28	$1.76

7. Quarterly data for the last four years from the same source further indicates that until the second quarter of fiscal 1972, the earnings for which were released on December 22, 1972, results were consistently better in each comparable period during each of those years:

Quarter:	1969-70	1970-71	1971-72	1972-73
August (first)	$0.25	$0.33	$0.46	$0.56
November (second)	0.25	0.31	0.41	0.33
February (third)	0.16	0.20	0.29	0.19
May (fourth)	0.33	0.44	0.60	(not yet available)

8. In summary, from fiscal 1965 through fiscal 1972, the annual earnings per share of Skyline Corporation consistently and substantially increased. In addition, from fiscal 1969 through and including the first quarter of fiscal 1972 (i.e., the quarter ended August 1972), the earnings per share of Skyline similarly increased on a quarterly comparative basis for each quarter in each year.

9. However, earnings for the second quarter ended November 1972, which were publicly announced on December 22, 1972, revealed for the first time a decrease in earnings. As compared to increases for the same quarter of 6¢ per share in 1970 and 10¢ per share in 1971, for the quarter ended November 1972, there was a drop of 8¢ per share. (The next quarter, ended February 1973, also showed a drop of 10¢ per share as compared to the same quarter in the preceding fiscal year.)

10. After rising to its $74 peak in April 1972, the trading price of Skyline shares declined during the rest of the year, except for a brief rally in the second half of November. A chart showing the daily high, low and closing prices for Skyline stock during 1972 and January - April 1973 is attached as Exhibit A.

11. On December 22, 1972, trading in Skyline opened at $49 3/4 per share. At approximately 12:13 p.m., a report of Skyline's second quarter earnings was published on the Dow Jones broad tape. As shown above, it disclosed a sharp reversal of the consistent previous upward earnings trend.

12. Neither I nor anyone else in my firm had been given any prior notice that the announcement of Skyline earnings would be issued on December 22, 1972 nor had we been told what the earnings figures would be.

13. The announcement of Skyline's earnings immediately triggered a selling response on the trading floor of the Exchange. Numerous brokers with orders to sell, some of whom were representing orders to sell large blocks of Skyline shares, rushed to my post. For example, as I later learned, Walston & Co. had an order to sell approximately 70,000 shares; Burnham & Co. had an order to sell approximately 80,000 shares; and Goldman, Sachs & Co. had another large order. Orders to buy already on the specialist's "book" and the few, if any, orders to buy represented by brokers in the crowd at the Skyline post were inadequate in relation to the selling pressure and volume that was becoming manifest to enable trading to continue in a fair and orderly manner. Rather, it was evident that even if trading could briefly continue, the price of Skyline shares would continue to drop very substantially. Thus, between 12:13 p.m., when the Skyline earnings announcement appeared, and the last trade in Skyline only several minutes later, the trading price per share had dropped from $49 to $47 1/2. Therefore, shortly following the announcement of Skyline's earnings, I brought the developing situation to the attention of Mr. William W. Rosenau, an Exchange floor official, and trading was then halted at approximately 12:20 p.m. by the Exchange. A copy of the announcement of the halt is attached hereto as Exhibit B.

14. After the halt in trading, Mr. Rosenau, other Exchange officials and I, as the specialist, paid careful attention to the buy and sell orders received for Skyline during the remainder of the trading day. At three separate

times during the afternoon of December 22, indications were issued with respect to Skyline, ("Indications" are announcements on the trading tape of the general range in which the stock might sell were trading then to resume, based on the balance of orders then on hand.) However, at approximately 3:04 p.m., with less than an hour remaining before Exchange trading closed for the long Christmas weekend, it was determined not to reopen trading that day in order to permit the news concerning Skyline to reach and be absorbed by a broader segment of the investing public and thus, to provide the opportunity for a more representative market of buyers and sellers.

15. The next business day was Tuesday, December 26, 1972. Trading in Skyline did not begin at the regular morning hour because there was a continuing imbalance of orders to sell over orders to buy and because it was considered advisable to permit further public dissemination of Skyline's earnings in view of the sharp anticipated drop in the stock's price at an eventual reopening. Instead, during the morning, further indications as to possible opening price ranges were issued in light of the pattern of orders received and represented. Thereafter, at 1:01 p.m., trading was reopened. The first transactions were at a price of $34 per share; the market closed at $32 5/8. In the period since, as shown graphically on Exhibit A, the trading price of Skyline has consistently declined, never again reaching $34 per share. Thus, by January 12, 1973, the date the complaint was filed, Skyline closed at $25 3/4 per share. Since then, it has dropped still further, trading in the last two weeks, for example, in a $16-$14 range.

16. The market's disenchantment, as reflected in the consistent decline in the trading price of the stock since December 26, 1972, was, no doubt, confirmed by the release after the close of trading on March 21, 1973 of Skyline's

third quarter earnings of $0.19 as compared to $0.29 for the previous third quarter. On March 22, the first trading day following the third quarter earnings announcement, Skyline closed at $16 7/8, down $1 5/8 from the previous day's close.

17. In view of the plaintiff's suggestion in his complaint as to improper conduct on my part and that of my firm, I believe it is significant to note that on December 22, 1972, in the minutes immediately following the announcement of Skyline's earnings before trading was halted, my firm purchased 1,900 shares of Skyline, and held 32,800 on the end of that day. Thus the $13 1/2 price drop between the halt on December 22nd and the reopening on December 26th meant a $442,800 paper loss to our firm. It is therefore absurd for plaintiff to suggest that either I or my firm committed any conduct with a view to personal gain.

18. In his complaint and in his papers seeking class action determination, plaintiff has several times alleged that I and my firm are able to identify the members of the class he purports to represent. As indicated in our answers to plaintiff's interrogatories, neither I nor my firm has information that would disclose the identities of the shareholders of Skyline Corporation. Moreover, although my firm does not maintain accounts for customers to trade in the stock of Skyline, in my experience, stock held for customers in margin maintenance accounts by brokers is generally held in "street" name, i.e., in a name other than that of the beneficial owner. Therefore, it would be unlikely that even Skyline Corporation would have records enabling plaintiff to identify those persons within the broader class who held Skyline stock in margin maintenance accounts. Presumably, identification of members of this sub-

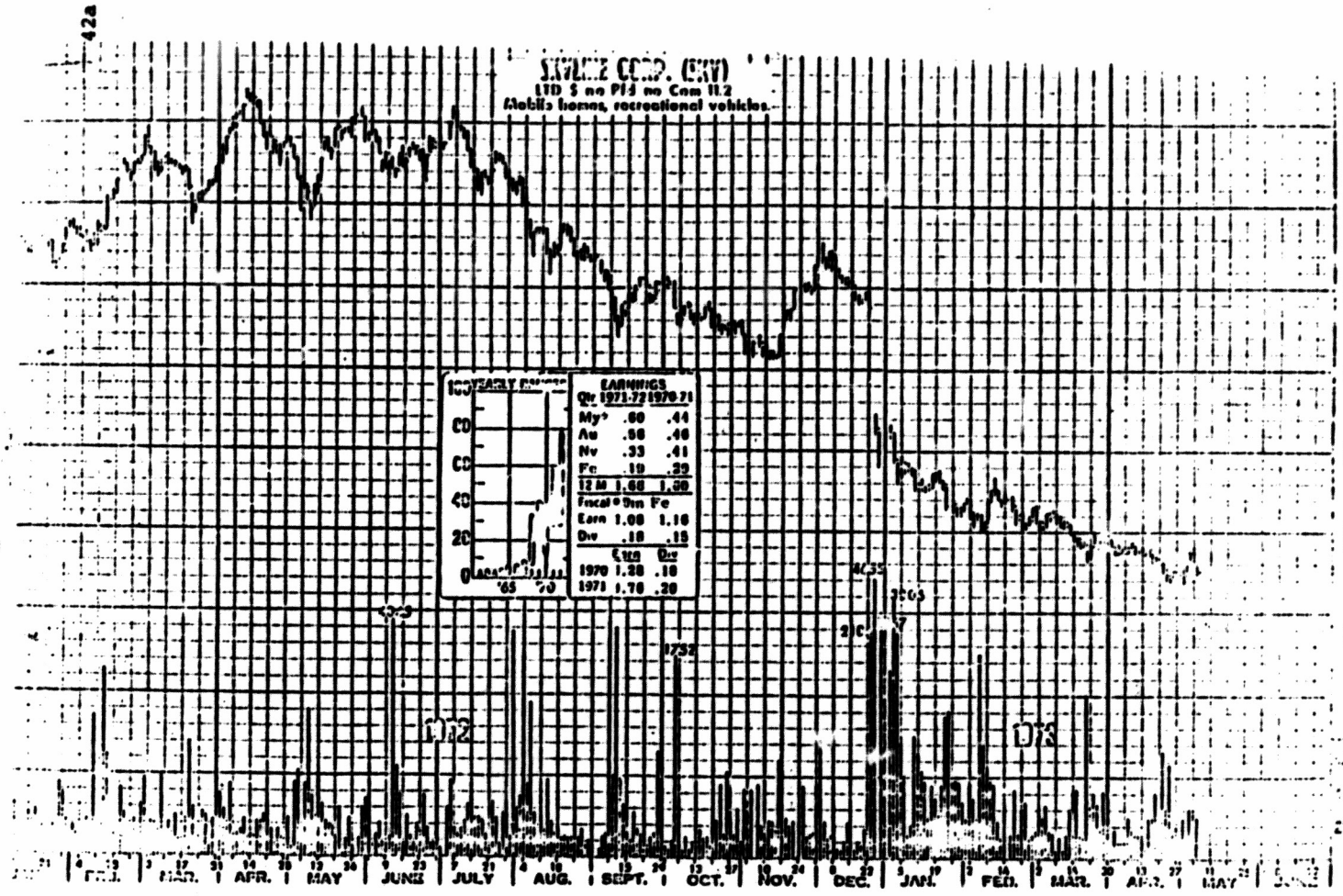
class would require discovery procedures as to all registered broker-dealers who held Skyline stock in "street" name.

Albert Fried, Jr.

Sworn to before me this
31st day of May, 1973.

Fred C. Sparkes

FRED C. SPARKES
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 1974



TRDNG HALTED SKY ORDER INFLUX LAST SALE

47½

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff

v.

ALBERT FRIED JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants

73 Civ. 227 (LFM)

ORDER APPROVING FORM OF NOTICE

The Court having received a proposed form of notice from the plaintiff, as class representative, and a proposed form of notice from the defendants and finding the defendants' form of notice to be in conformity with both the Opinion of this Court dated March 13, 1974, and the notice requirements of Rule 23 of the Federal Rules of Civil Procedure; it is

ORDERED that the proposed notice, as annexed hereto, be and hereby is approved; and it is further

ORDERED that the plaintiff, as class representative, shall promptly submit to the Court recommendations regarding the method by which class members shall be identified and the mailing of notice effectuated.

SO ORDERED,

MacMahon, U.S.D.J.

Dated:

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

v.

ALBERT FRIED, JR., ALBERT FRIED & CO., AND THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

- -x

PROPOSED NOTICE OF PENDENCY OF CLASS ACTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF PENDENCY OF CLASS ACTION

Clyde H. Cutner, a shareholder in Skyline Corporation on December 22, 1972, has commenced a legal action in this Court against the New York Stock Exchange, Inc. (hereinafter: Exchange) and Albert Fried, Jr., and Albert Fried & Co., respectively, the Specialist and the Specialist firm (hereinafter: Specialists) in Skyline Corporation shares on the Exchange. Mr. Cutner is seeking damages, and such other relief as may be proper, for alleged violations of the Securities Exchange Act of 1934 and the Rules of the Exchange. Further, Mr. Cutner seeks to maintain the action not only on his own behalf, but also on behalf of all those persons and entities which held Skyline Corporation stock at any time between 12:11 p.m. on December 22, 1972, and 1:10 p.m. on December 26, 1972 (whether or not they still hold such stock). The violations alleged are that the Specialists and the Exchange together wrongfully stopped trading in Skyline Corporation shares at 12:11 p.m. on December 22, 1972, although Skyline Corporation was a financially sound corporation having good prospects, and did not resume trading in such shares until 1:10 p.m. on December 26, 1972. It is alleged that, in addition, the Specialists and the Exchange have by statements and acts falsely represented that the value of Skyline Corporation shares had been substantially reduced; and that by stopping trade, by resuming trade at a reduced price, and by their representations the defendant Specialists and the defendant Exchange wrongfully depressed the market in Skyline Corporation shares. The defendant Specialists and the defendant Exchange have denied the alleged violations and wrongful acts and have asserted various affirmative defenses to the action.

THE COURT HAS NOT EXPRESSED ANY OPINION ON THE MERITS OF THE ACTION AND THE SENDING OF THIS NOTICE IS NOT TO BE CONSTRUED AS AN EXPRESSION OF ANY OPINION.

The purpose of this notice is simply to advise the members of the class on whose behalf the action has been brought of the pendency of the action and of their rights with respect thereto as follows:

1. Unless you request to be excluded from the class by 60 days from the date of this notice (the date of your request to be governed by postmark) you will be included in the class and any judgment on the cause of action, whether favorable or not, will bind you; and

2. If you wish to be excluded from the class you must inform the Clerk of this Court by appropriately marking the attached request and returning it in the enclosed return envelope by the above deadline; and

3. If exclusion is not requested, but you prefer to be represented by your own counsel, you may enter an appearance through him.

4. If exclusion is not requested, you may be liable to share, proportionately, the costs of the action if it is unsuccessful.

The attorneys representing the class are Harold E. Kohn, P.A., Attorneys at Law, 1214 IVB Building, 1700 Market Street, Philadelphia, Pennsylvania 19103, and Milberg & Weiss, One Pennsylvania Plaza, New York, New York 10001.

Dated: _____

_____

Clerk,
United States District Court
for the Southern District
of New York
United States Courthouse
One Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,	:	
Plaintiff,	:	
v.	:	No. 73 Civ. 227 LFM
ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE,	:	
Defendants.	:	

Clerk
United States District Court
for the Southern District of New York
United States Courthouse
One Foley Square
New York, New York 10013

I hereby request to be excluded from the class on whose behalf Clyde H. Cutner has filed the above-captioned suit.

Dated:

Signature: _____

Name: _____
(please print)

Address: _____

_____

Defendants' Memorandum
in Support of Motion to
Decertify the Action and
to Strike Class Action Allegations
from the Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

73 Civ. 227 (L.F.M.)

- x

MEMORANDUM IN SUPPORT OF MOTION TO DECERTIFY THE ACTION AND TO STRIKE THE CLASS ACTION ALLEGATIONS FROM THE COMPLAINT

MILBANK, TWEED, HADLEY & McCLOY
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

William E. Jackson
Briscoe R. Smith

Of Counsel

CLEARY, GOTTLIEB, STEEN & HAMILTON
1 State Street Plaza
New York, N.Y. 10004
Attorneys for Defendants
Albert Fried, Jr. and
Albert Fried & Co.

George J. Grumbach, Jr.

Of Counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,	:	
Plaintiff,	:	
-against-	:	73 Civ. 227 (L.F.M.)
ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC.,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF MOTION TO DECERTIFY THE ACTION AND TO STRIKE THE CLASS ACTION ALLEGATIONS FROM THE COMPLAINT

Defendants move to decertify this action and to strike the class action allegations (paragraphs 13 through 20) from the complaint, pursuant to Rule 23, subdivisions (c)(1) and (d)(4), of the Federal Rules of Civil Procedure, because of plaintiff's failure to comply with the orders of this Court and to otherwise prosecute the action.

Prior Proceedings

On January 12, 1973, plaintiff filed a complaint against the New York Stock Exchange, Inc. (the "Exchange"), Albert Fried, Jr., a member of the Exchange who, together

with others, is registered as a "specialist" in the stock of Skyline Corporation ("Skyline") and Albert Fried & Co., in which Mr. Fried is a partner. Plaintiff seeks recovery for himself and for a class consisting of approximately 11,000 members, on the grounds that defendants acted fraudulently and negligently in the discharge of their duties relating to the regulation of trading in Skyline stock. Plaintiff's own damages are said to total in excess of $100,000.

Plaintiff's allegations are based on the decision to suspend trading temporarily in Skyline stock on the Exchange. This decision was prompted by a large influx of sell orders following Skyline's announcement of a decline in earnings. It was determined that the suspension in trading was necessary to maintain a fair and orderly market in Skyline stock. (Affidavit of Albert Fried, Jr., dated May 31, 1973, submitted in opposition to class action motion, ¶¶ 13, 14).

This Court, over defendants' opposition, certified the action as a class action in an opinion dated March 13, 1974 and reported at 373 F.Supp. 4. The Court defined the class as consisting "of all those who held Skyline stock at any time [during the period when trading was suspended] and who suffered damage by reason of any of the wrongful acts alleged in the complaint." (373 F.Supp. at 14.) The Court

directed plaintiff "to give individual notice to all class members who can be identified through reasonable effort," concluded that "[n]otice by the mail is the best method and ordered plaintiff to bear its cost.

On April 8, 1974, the Court approved a form of notice. In addition, it ordered plaintiff to "promptly submit to the Court recommendations regarding the method by which class members shall be identified and the mailing of notice effectuated." (That order is annexed to the notice of motion.) Following plaintiff's motion for reargument, the Court adhered to its original decision.*

In complete disregard of this Court's orders and despite the passage of more than a year's time, plaintiff, to defendants' knowledge, has not submitted recommendations to the Court regarding the identification of class members nor has he given notice to the class.

Furthermore, no effort has been made in over two years to prosecute the action on its merits. With the exception of written interrogatories and a request for the production of documents served in March 1973, plaintiff has failed to conduct any discovery.

To defendants' knowledge, no other litigation involving the suspension of trading in Skyline stock has been commenced or threatened. (Affidavit of Albert Fried, Jr., dated July 2, 1975, ¶ 2)

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* On April 12, 1974, defendants filed a notice of appeal from that part of the Court's decision which granted class certification. On June 20, 1974, the parties stipulated to a dismissal of the appeal.

THE ACTION SHOULD BE DECERTIFIED BECAUSE OF PLAINTIFFS'S FAILURE TO COMPLY WITH THIS COURT'S ORDERS AND TO OTHERWISE ADEQUATELY REPRESENT THE CLASS

At the time of the motion for class action determination, plaintiff's counsel assured the Court that "[t]hey can be counted on to engage in vigorous prosecution of this action" (Plaintiff's Memorandum in Support of Motion for Class Action Determination, p. 15). The affidavit of plaintiff's New York counsel filed in support of plaintiff's motion for class action determination sets forth his firm's and his co-counsel's credentials at some length. Plaintiff's counsel stated that his firm has been appointed lead or general counsel in several significant class actions waged against substantial defendants and has obtained large recoveries. His Philadelphia co-counsel is credited with numerous successes and several massive recoveries. The affidavit alleges that "plaintiff...will vigorously prosecute this action on behalf of all members of the class." (Moving affidavit of Melvyn I. Weiss, undated, pp. 9, 10).

Yet, despite these representations, plaintiff has failed to "fairly and adequately protect the interests" of the class (F.R.Civ. P. 23(a)(4)). Plaintiff's failure to comply with the Court's orders and otherwise prosecute the action disqualifies him as an adequate representative.

The Court of Appeals for this Circuit has ruled

that the requirement of adequate representation imposes clear responsibilities on both the plaintiff and his attorney. Plaintiff must "prosecute the case vigorously...", Korn v. Franchard Corp., 456 F.2d 1206, 1212 (2d Cir. 1972), and his attorney must be "qualified, experienced and generally able to conduct the proposed litigation." Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968). As this Court noted in Federman v. Empire Fire & Marine Insurance Co., 19 F.R.Serv.2d 480, 483 (S.D.N.Y. 1974) the "requirement is satisfied if [among other things] plaintiffs' counsel is experienced and will vigorously prosecute the action...." Clearly, however, "the primary criterion is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to assure them due process." Mersay v. First Republic Corporation of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968). See also, In re Caesers Palace Securities Litigation, 360 F.Supp. 366, 396 (S.D.N.Y. 1973); Herbst v. Able, 47 F.R.D. 11, 15 (S.D.N.Y. 1969).

This Court, in deciding the question of certification measured plaintiff and his attorney by the standard set forth in Eisen v. Carlisle & Jacquelin, supra, and determined that they would fairly and adequately represent the class. The plaintiff's record of total inactivity establishes that such a conclusion is no longer justified. Decertification

is appropriate because the prerequisites for maintaining a class action are no longer satisfied. Feder v. Harrington, 52 F.R.D. 178, 182 (S.D.N.Y. 1970). See also, Jacobs v. Paul Hardeman, Inc., 42 F.R.D. 595 (S.D.N.Y. 1967) (ordering decertification where, among other things, the named plaintiffs had become reluctant representatives).

Decertification may be ordered under Rule 23, subdivisions (c)(1), (d)(4) or both. See, e.g., Jacobs v. Paul Hardeman, Inc., supra. Rule 23(c)(1) provides that an order certifying an action "may be altered before a decision on the merits." Federman v. Empire Fire & Marine Insurance Co., supra, 19 F.R.Serv.2d at p. 483. Indeed, Rule 23 places a court "under a continuing duty...to monitor the cases and to review the class determination previously made...." Zenith Laboratories, Inc. v. Carter-Wallace, Inc., 64 F.R.D. 159, 164 (D.N.J. 1974).

This flexibility is essential under the Rule in light of the preference on close questions for an initial determination in favor of certification, Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969), and the difficulty in predicting the extent to which the elements of Rule 23, subdivisions (a) and (b), will be satisfied. Subdivision (d)(4) empowers the court to issue an order, when appropriate, "requiring that the pleadings be amended to eliminate therefrom allegations as to representation

of absent persons, and that the action proceed accordingly." Fed.R.Civ.P. 23(d)(4).

CONCLUSION

Plaintiff's failure to comply with this Court's orders, to give notice in this action and to otherwise pursue the claims of the class disqualifies him as an adequate representative and leaves a precondition to the action proceeding as a class action unsatisfied. For these reasons, an order decertifying the action and striking the class allegations contained in paragraphs 13 through 20 of the complaint should be granted.

Dated: New York, N.Y.
July , 1975

Respectfully submitted,

MILBANK, TWEED, HADLEY & McCLOY

By Briscoe R. Smith
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

CLEARY, GOTTLIEB, STEEN & HAMILTON

By GEORGE J. GRUMBACH, JR.
(A Member of the Firm)
1 State Street Plaza
New York, N.Y. 10004
Attorneys for Defendants
Albert Fried, Jr. and
Albert Fried & Co.

August 6, 1975 Affidavit of
Melvyn I. Weiss in Opposition to
Defendants' Motion for an Order
Decertifying the Action as a Class Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CLYDE H. CUTNER, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

- -x

73 Civ. 227 (LFM)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MELVYN I. WEISS, being duly sworn, deposes and says:

I am a member of Milberg & Weiss, local counsel for plaintiff in the instant action, and make this affidavit in opposition to defendants' motion for an order decertifying this action as a class action.

Plaintiff, Clyde H. Cutner, resides in Philadelphia, Pennsylvania and sustained losses in excess of $50,000 incurred by virtue of a decline in the market price of Skyline Corporation, in which plaintiff owned 7,500 shares. The decline is alleged to have been artificially caused by virtue of the failures of defendants Albert Fried, Jr. and Albert Fried & Co., specialists in the stock, and the New York Stock Exchange resulting from alleged wrongful activities in stabilizing the market of Skyline.

On December 22, 1972, plaintiff retained the Pennsylvania law firm of Harold E. Kohn, P.A., Attorneys at Law ("Kohn Firm") to institute a class action. Thereafter, it was determined by the Kohn Firm that proper venue rested in the Southern District

of New York and the firm of Milberg & Weiss was retained to act as "local counsel" in the litigation.

The action was strenously litigated culminating in a class determination by this Court by opinion dated March 13, 1974.

During pretrial discovery numerous documents were produced by the defendants and for the past several months have been thoroughly analyzed by the Kohn Firm.

Subsequent to the said analysis, discussions were held between the Kohn Firm and plaintiff to determine whether or not the action had sufficient merit to continue.

I am informed that those discussions resulted in certain disagreements between plaintiff and the Kohn Firm concerning certain aspects of this litigation.

Until one week ago, the role of Milberg & Weiss in this litigation was that of local counsel available to the Kohn Firm for consultation from time to time as requested. The Kohn Firm, by agreement with plaintiff was primarily responsible for the prosecution of the action.

As a result of the genuine disagreements between the Kohn Firm and plaintiff, plaintiff consulted your deponent and requested that the firm of Milberg & Weiss accept primary responsibility for the continued prosecution of this action. I have thoroughly reviewed the file, conducted discussion with members of the Kohn Firm and plaintiff, have reviewed the court record and this Court's prior decisions and as a result I have accepted the request to take over sole responsibility for the continued prosecution of the case.

It is important to emphasize that the Kohn Firm has invested hundreds of hours of skillful service on behalf of plaintiff and the class and has determined to withdraw as principal

counsel on the basis that such a withdrawal will be in the best interest of plaintiff and the class.

I have spoken at length to plaintiff and he has informed me that he is prepared to advance all costs connected with the notification of pendency of this action to the class and any other costs related to the prosecution of this action.

The firm of Milberg & Weiss stands ready to meet any time schedule set by this Court for discovery and for the trial of this action.

In view of the new developments concerning counsel representing plaintiff and the class, it is respectfully urged that defendants' motion to decertify the class be denied.

Melvyn I. Weiss

Sworn to before me this

6 day of August, 1975.

Notary Public

PATRICIA K. COLE
Notary Public, State of New York
No. 30-5755240
Qualified in Nassau County
Commission Expires March 30, 1976

August 14, 1975 Reply Affidavit
of Briscoe R. Smith in Support of
Motion to Decertify Class Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated, :

Plaintiff, : 73 Civ. 227 (LFM)

-against- : REPLY AFFIDAVIT IN SUPPORT OF MOTION TO DECERTIFY CLASS ACTION

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC., :

Defendants. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BRISCOE R. SMITH, being duly sworn, says:

1. I am a member of Milbank, Tweed, Hadley & McCloy, attorneys for The New York Stock Exchange, Inc. (the "Exchange"), a defendant in this action. I am familiar with the proceedings in this action and submit this reply affidavit in support of defendants' motion to decertify the action and strike the class action allegations from the complaint.

2. I am authorized by George Weisz, Esq. of Cleary, Gottlieb, Steen & Hamilton to advise the Court that it endorses and joins in the points advanced in this affidavit.

Mr. Cutner's Failure to Represent the Class

3. It is conceded that Mr. Cutner and his lawyers abandoned the class and that the interests of the members of the class have been completely neglected for more than 17 months. Thus, neither plaintiff nor any of his lawyers have responded to the facts laid out in defendants' motion papers

regarding plaintiff's demonstrated failure to represent the class. Mr. Cutner has done nothing to advance his substantial claims--much less those of the class he purports to represent--except to serve a few interrogatories and discovery requests and to be certified as class representative, in the more than two and one half years since the commencement of this action. He has done absolutely nothing in the 17 months since certification, in flagrant disregard of this Court's orders. Doubtless Mr. Cutner would have continued to sleep both on his alleged claims and of those of the class members had it not been for defendants' motion.

4. Moreover, Mr. Cutner offers no reason why, after abandoning the class, he should again be entrusted with the rights and obligations of absent class members. Similarly, no explanation is offered for Mr. Cutner's disregard for the orders of this Court.

5. With a track record of more than 17 months, plaintiff has demonstrated that his certification was contrary to the best interest of the class. Not even his counsel has attempted to rehabilitate him. He has breached the fiduciary duty to the class members by failing to comply with the orders of this Court and to otherwise prosecute this action. It is abundantly clear that Mr. Cutner is not a suitable representative.

Milberg & Weiss, as Attorneys for the Class

6. Much of the affidavit of Melvyn Weiss, sworn to August 6, 1975, discusses the "substitution" of the law firm of Milberg & Weiss for Harold E. Kohn, P.A. as "main" counsel in this action. When the class certification motion was made, however, the Court was assured that Milberg & Weiss was

eminently qualified to advance the interests of the class and that it would do so. But Milberg & Weiss was content to do nothing to comply with this Court's order simply because it had some kind of an arrangement with the Kohn firm. Whatever these arrangements between the lawyers were, the fact remains that Milberg & Weiss, just as the Kohn firm, has shown complete indifference to its obligations to absent class members. Like Mr. Cutner, Milberg & Weiss does not even attempt to explain away its 17 month lack of attention to the interests of the class members.

7. In short, as plaintiff and counsel in effect concede, by failing to attempt to excuse their indifference to the interests of the class, Milberg & Weiss abandoned the class, just as did the Kohn firm and Mr. Cutner. The Court should not, we submit, entrust further the rights of the class to a representative and his lawyers which, given 17 months to make good on claims of energetic representation, have failed utterly to justify the Court's initial confidence.

Plaintiff's Ability to Finance the Litigation

8. One final point should be made because of Mr. Weiss' assertion that Mr. Cutner is prepared to advance all costs of notice and prosecution of the case. Mr. Cutner has, of course, been responsible for these costs since the commencement of this action. The unmistakable inference is that, subsequent to class action certification and the requirement of individual notice, Mr. Cutner was unwilling or unable to pay. In any event, counsel's representation must be disregarded in light of the refusal in the course of defendants' discovery to answer questions regarding the financial ability to pay. At the least, a sworn statement by the plaintiff with appropriate support should be required where plaintiff's representative

status is challenged after the class as a practical matter has been abandoned. Moreover, plaintiff's counsel made substantially the same representation more than one year ago when he stated that "plaintiff has offered to undertake the payment of costs." (Memorandum in Support of Motion for Reargument, point 8, dated April 19, 1974.) The experience of the last year has shown these representations for what they are worth.

9. Defendants respectfully request an order decertifying the action, striking the class action allegations from the complaint, and for such other relief as may seem just and proper.

Briscoe R. Smith

Sworn to before me this
14th day of August, 1975

JANICE R. JOHNSON
NOTARY PUBLIC, State of New York
No. 24-7002065
Qualified in Kings County
Cert. Filed in New York County
Commission Expires March 30, 1975

October 29, 1975
Notice of Motion
to Decertify Class Action

- x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

NOTICE OF MOTION

73 Civ. 227 (LFM)

- x

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Briscoe R. Smith, sworn to October 29, 1975, the orders of this Court dated March 13, 1974, April 8, 1974 and September 29, 1975 and the affidavits of Albert Fried, Jr., sworn to May 31, 1974 and July 2, 1975, the undersigned will move this Court before the Honorable Lloyd F. MacMahon in Room 905 of the United States Court House, Foley Square, New York, N.Y., on November 14, 1975 at 2:15 P.M., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 23, Subdivisions (c)(1) and (d)(4) of the Federal Rules of Civil Procedure decertifying the action as a class action on the grounds that plaintiff is an inadequate representative of the class and for such other and further relief as may seem just and proper.

Dated: New York, N.Y.
October 29, 1975

Yours, etc.,

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

CLEARY, GOTTLIEB, STEEN & HAMILTON

By _____
(A Member of the Firm)
1 State Street Plaza
New York, N.Y. 10004
Attorneys for Defendants
Albert Fried, Jr. and
Albert Fried & Co.

TO:

MILBERG & WEISS
1 Pennsylvania Plaza
New York, N.Y. 10001
Attorneys for Plaintiff

October 29, 1975 Affidavit
of Briscoe R. Smith in Support
of Motion to Decertify Class Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

- x

AFFIDAVIT IN SUPPORT OF MOTION TO DECERTIFY CLASS ACTION

73 Civ. 227 (LFM)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BRISCOE R. SMITH, being duly sworn, says:

1. I am a member of Milbank, Tweed, Hadley & McCloy, attorneys for the New York Stock Exchange, Inc. (the "Exchange"), a defendant in this action. I am familiar with the proceedings in this action and submit this affidavit in support of the defendants' renewed motion to decertify the action and strike the class action allegations from the complaint. I am authorized by George Grumbach, Esq. of Cleary, Gottlieb, Steen & Hamilton, attorneys for Albert Fried, Jr. and Albert Fried & Co., to advise the Court that he endorses and joins in this affidavit.

2. On August 1, 1975, defendants moved for an order decertifying the action as a class action. The motion was based on plaintiff's undisputed failure to fulfill his obligations to the class he purports to represent by taking steps to prosecute the action on behalf of the class.

3. On September 29, 1975, this Court denied defendants' motion "without prejudice to renew within 30 days upon a showing

that in the interim, plaintiff has failed to take steps to prosecute this suit diligently." A copy of that order is attached as Exhibit A.

4. Thirty days have passed since the date of that order. Plaintiff, during that period, has done nothing to prosecute this action. Accordingly, defendants renew the motion.

5. The nature and history of this action are set forth in defendants' memorandum dated July 16, 1975 originally filed in support of the motion to decertify and resubmitted in support of this motion. In substance, plaintiff seeks recovery for himself and for a class consisting of approximately 11,000 members, on the grounds that defendants acted fraudulently and negligently in the discharge of their duties relating to the trading in a listed security.

6. Plaintiff commenced this action on January 12, 1973. Since then, to our knowledge, plaintiff has failed "to give individual notice to all class members who can be identified through reasonable efforts" (Opinion of the Court, dated March 13, 1974) or to "promptly submit to the Court recommendations regarding the method by which class members shall be identified and the mailing of notice effectuated" (Order of the Court, dated April 8, 1974). Nothing, to our knowledge, has been done to prosecute the action since the class action determination.

7. Plaintiff's counsel, in opposing defendants' original motion to decertify the action, failed to respond to the allegations regarding plaintiff's demonstrated failure to represent the class. No explanation was offered for plaintiff's and his counsel's disregard for the orders of this Court. No reason was put forward to explain why, after neglecting the class for 17 months, they should again be entrusted with the rights and obligations of absent class members.

8. For these reasons, defendants request an order decertifying the action as a class action, striking the class action allegations from the complaint and for such other relief as this Court deems just and proper.

Briscoe R. Smith

Sworn to before me this
29th day of October, 1975

Eileen M. Gilfone

EILEEN M. GILFONE
NOTARY PUBLIC, State of New York
No. 43-4512393
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires March 30, 1977

11 Civ. 221 (LBS)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC.

Defendants.

NOTICE AND AFFIDAVITS

MILBANK, TWEED, HADLEY & McCLOY
1 CHASE MANHATTAN PLAZA
NEW YORK, N. Y. 10005
212-412-5000
ATTORNEYS FOR Defendant New York Stock Exchange, Inc.

CURRY, GOTTLIEB, STERN & HAMILTON
1 State Street Plaza
New York, N.Y. 10004

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The within motion is hereby granted. The answer will be 30 days upon the time plaintiff has ordered to file to prosecute this suit diligently.

So ordered

Dated: New York, NY

Lloyd F. MacMahon
U.S.D.J.

DISTRICT JUDGE
FILED
1975
U.S.D.C.

MICROFILM

FEB 20 '75

OFFICE COPY

9-30-75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

CLYDE H. CUTNER, et al.,

Plaintiffs,

- against -

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

----------x

73 Civ. 227 (LFM)

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MELVYN I. WEISS, being duly sworn, dep[illegible] and says:

I am a member of the firm of Milberg & Weiss, attorneys for plaintiffs in the above action and make this affidavit in opposition to defendants' motion to dismiss the complaint.

I sincerely apologize for the oversight in not having realized that a decision was entered by your Honor on defendants' prior motion to dismiss for failure to prosecute.

In the exercise of caution, it has been the practice of my firm to have a clerk personally follow the opinion book maintained by the Clerk of the Southern District of New York for decisions in matters in which the office is involved and which are pending decision.

As the affidavit of Lawrence Maxon submitted herewith attests, he was charged with the responsibility to follow for an opinion, but for some reason the opinion was not

entered in the opinion book maintained by the Clerk of the Court.

In addition, our office usually receives a post card indicating that an order or decision has been entered in cases pending before the Southern District of New York in which we are involved, but no such notification was received in the above matter.

Immediately upon discovering this inadvertent failure to detect that an opinion had been rendered by your Honor, I caused a Notice to Take Deposition of the principal defendants to be served on October 31, 1975.

It is respectfully urged that the delay of two days will not prejudice any party to this litigation. In addition, I might note that I have personally reviewed the New York Law Journal and the notice that the opinion was rendered was not published until September 30, 1975. Therefore, the Notice to Take the Deposition was served on the thirtieth day following the day in which the notice was given in the New York Law Journal.

Upon receipt of the instant motion, I telephoned the attorney for the moving party and explained what had occurred and asked them to withdraw the motion. He told me he would let me know by Monday, November 3, 1975, but did not return the telephone call until Wednesday, November 5, 1975 at which time I was informed that the motion would not be withdrawn.

Under the circumstances, it is respectfully requested that the motion be denied.

Philip S. Weis

Sworn to before me this
6th day of November, 1975.

November 10, 1975 Affidavit of Lawrence Maxon in Opposition to Motion to Decertify Class Action, Together with Attachments

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CLYDE H. CUTNER, et al.,

Plaintiffs,

- against -

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

----------x

73 Civ. 227 (LFM)

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS ACTION

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

LAWRENCE MAXON, being duly sworn, deposes and says:

I am employed full-time by the law firm of Milberg & Weiss. My job responsibilities include making a daily check of the opinion records maintained by the Clerk of the Southern District of New York. The procedure in the office is for each attorney to inform me of the submission or argument of a motion where decision has been reserved. I thereafter check the name of the case in the opinion book described above daily. Occasionally I miss a day and I check on my next visit for the previous day.

Melvyn I. Weiss, a partner in the firm of Milberg & Weiss, instructed me to follow for a decision in Cutner v. Fried, et al. following his submission of papers to this Court for consideration. I had reviewed the opinion book for each day thereafter to determine whether an opinion was rendered.

On October 31, 1975, Mr. Weiss called me into his office and severely reprimanded me for having missed an opinion rendered by this Court on the pending motion which he informed me had been entered on September 29, 1975. Mr. Weiss informed me that he learned of the opinion by virtue of a motion served by the defendants dated October 29, 1975.

I was extremely upset by the reprimand and could not understand how I erred in follow-ng the case since I dilligently followed the case knowing the importance of the function. I informed Mr. Weiss that I had been following the case on a daily basis and was mystified by my failure to detect the opinion. I immediately left Mr. Weiss's office and on my own volition, went down to the Clerk's office and examined the opinion book. I discovered that the opinion was never entered in the book thereby explaining why I had not reported the rendering of the opinion. I attach hereto a photocopy of the opinion book for several days following September 29, 1975. I examined the book for each date following September 29, 1975 and can attest that the opinion was never entered.

LAWRENCE MAXON

Sworn to before me this
15th day of November, 1975.

Notary Public

PATRICIA K. COLE
Notary Public, State of New York
No. 30-5758246
Qualified in Nassau County
Commission Expires March 30, 1976

November 13, 1975 Reply Affidavit
of John E. Smith in Support of
Motion to Decertify Class Action

43124	Amended Order ... Chemical Corp. vs. The Chester 6.	... 33	Cooper	9.25.75
43125	U.S.A. vs. William Sarasmino	... 923	Brieant	9.25.75
43126	U.S.A. ex rel Orlando Cabrera vs. Harold Ruffin	73 Civ. 1207	Motley	9.25.75
43127 A	In re Callard International Carriers vs. Omni International Corp. et al.	73 Civil 1007	Cannella	9-26-75
43127 Vacated 10-6-75	Mary A. Schifini - vs. Michael J. Pinto	74 Civil 5048	Connor	9.26.75
43128	Howard M. Lasker et al. - vs. Harry B. Burke, Jr. et al.	73 Civil 552	Weinfeld	9-26-75
43129	U.S.A. ex rel. S. Mikaelian Youngblood vs. Malcolm Wilson et al.	74 Civil 2754	Pierce	9-26-75
43130	Ugo Rubinic - vs. Dampskibsaktieselskabet Hercules et al.	74 Civil 4608	Motley	9-26-75
43131	William Broder - vs - New York News, Inc.	75 Civil 4161	Connor	9.26.75
43132	Khaliet McKennon - vs - J.C.V. Patterson	73 Civil 3998	Stewart	9-29-75
43133	In the matter of Hoyle Industries, Inc.	74-B-166	Brieant	9.29.75
43134	U.S.A. - vs. Bernard Bergman - Stanley Bergman	75 Cr. 785	Frankel	9-29-75
43135	Mat Grenger et al. - vs. Milton Spitz et al.	72 Civil 3784	Stewart	9-29-75
43136	Nathan Lewin - vs. The New York Times Co. - Frank Friedl	75 Civil 349	Bonsal	9-29-75
43137	Gloria Schwartz et al. - vs. Boston Hospital For Women et al.	71 Civil 1562	Lasker	9-29-75
43138	Steven Flake, William J. Hackett et al. vs. David I. Kagel et al.	72 Civil 1901	Lasker	9-29-75
43139	Dupont Glore Forgan Inc. et al. - vs. American Telephone & Telegraph	73 Civil 2447	Weinfeld	9-29-75
43140	Tanino Crisci, etc. - vs Roger Bowman, et al.	75 Civil 2983	Frankel	9-29-75
43141	Robert R. Felton et al. - vs. Walston & Co. Inc. et al.	73 Civil 2200	Bonsal	9-29-75
43142	U.S.A. - vs. Milton Parness - Barbara Parness	73 Cr. 750	Bonsal	9-29-75
43143	Paul Baran - vs. Borden, Inc.	72 Civil 4246	Levet	9-29-75
43144	Robert Walner et al. - vs. Benjamin Friedman et al.	75 Civil 1894	Brieant	9-30-75
43145	Frederick H. Brooks, et al. - vs. American Export Industries	71 Civil 5128	Pierce	9-30-75
43146	Abraham B. Feldner, et al. - vs. EKG Service Corp. et al.	75 Civil 179	Frankel	9-30-75
43147	U.S. ex rel. Mark Frasier - vs - J. L. Lasker	75 Civil 1556	Brieant	9-30-75

[illegible] AN OPINION BUT IS AN ORDER OF TRANSFER

NAME OF CASE	CASE NUMBER	JUDGE	DATE	PAGE
[illegible] Lawrence J. Becker, et al. -vs- Charles R. Able et al.	66 Civil 3271 66 Civil 3775	Motley	9-30-75	19
Mercean Freedom Lines, Ltd. -vs- Northeast Marine Terminal	73 Civil 4569	Motley	9-30-75	6
Franklin State Bank -vs- U.S.A.	72 Civil 2135	Motley	9-30-75	10
Jeffrey A. Boyko -vs- The Reserve Fund Inc.	74 Civil 3419	Gagliardi	9-30-75	12
[illegible] Est. of Lt. Vincent J. Afanc -vs- Eugene L. Fava	75 Civil 1358	Tenney	9-30-75	15
Samuel Mellis -vs- Federal Deposit Insurance Corp.	75 Civil 909	Pollack	9-30-75	16
Harry Wexner -vs- Zenith Laboratories, Inc.	75 Civil 4474	Werker	9-30-75	1
[illegible] Peace of Home for Children Inc. -vs- Local 1115 Joint Board	75 Civil 889	Brieant	9-30-75	14
First National City Bank -vs- S. Allen Klein	74 Civil 457	Lasker	9-30-75	7
Victor Emperor S. Varelese -vs- Federal Deposit Ins.	75 Civil 1831	Lasker	9-30-75	5
Harold McClendon -vs- Thomas E. Rosetti	70 Civil 3851	Lasker	9-30-75	3
New York Stock Exchange, Inc. et al vs Keyes Motel Inc. et al	71 Civil 2912	Lasker	9-30-75	3
[illegible] Faire Calabria, etc. -vs- Associated Hospital Services	73 Civil 5446 73 Civil 3326	Bonsal	9-30-75	9
[illegible] Connell, Schuerman & Davis -vs- Virginia R. Jones-Brown	75 Civil 2090	Werker	10-1-75	3
[illegible] W. Heyman & C. Hendler -vs- Charles Wohletetter	74 Civil 4555	Duffy	10-1-75	8
[illegible] Graham Walker et al. -vs- Liquor Salesmen Union Local 2 et al.	75 Civil 890 75 Civil 891-892	Conner	10-1-75	16
[illegible] U.S.A. -vs- Alfred Lewis	74 Cr. 1156	Brieant	10-1-75	8
Thomas R. Nelson -vs- American Export Isbrandtsen Lines	71 Civil 4646	Bonsal	10-1-75	3
[illegible] Competitive Associates, Inc. -vs- Advest Co.	72 Civil 1847	Carter	10-1-75	14
[illegible] K. Lonowski -vs- Shearman & Sterling	75 Civil 2075	Frankel	10-1-75	2
[illegible] Goldstein & Sons, Inc. -vs- S. Lionel Rosenzweig	74 Civil 4865	Gurfein	10-1-75	2
[illegible] Enders -vs- Leon Levy, et al.	69 Civil 1242	Gurfein	10-1-75	3
[illegible] et al -vs- Christian Haaland & Boice et al.	71 Civil 5357	Gurfein	10-1-75	2
[illegible] -vs- Louis H. [illegible]	69 Civil 1939	Knapp	10-1-75	24

	Abram Walker et al. - vs. Liquor Salesmen Union Local 338 et al.	75 Civil [illegible]	[illegible]	[illegible]
43164	U.S.A. - vs. Alfred Lewis	75 Civil 771 - Cr.	Conner	10-1-
43165	Thomas R. Nelson - vs. American Export Isbrandtsen Lines	74 Cv. 1156	Brieant	10-1-75
43166	Competitive Associates, Inc. - vs. Advest Co.	71 Civil 4646	Bonsal	10-1-75
43167	Mary K Lonowski - vs. Shearman & Sterling	72 Civil 1847	Carter	10-1-75
43168	M. Lowenstein & Sons, Inc. - vs. S. Ulvind Rosenzwig	75 Civil 2075	Frankel	10-1-75
43169	Irving Sanders - vs. Leon Levy, et al.	74 Civil 4865	Gurfein	10-1-75
43170	Anton Pruneda et al. vs. Christian Haaland & Sons et al.	69 Civil 1242	Gurfein	10-1-75
43171	Kurt Schmeder - vs. Louis H. Hall, Jr.	71 Civil 5357	Gurfein	10-1-75
43172	Charlene Whitney - vs. Greater New York Corporation	69 Civil 1939	Knapp	10-1-75
43173	Paul F. Rao, Jr. - vs. Maurice H. Nadjari et al.	75 Civil 484	Lasker	10-1-75
43174	Paul F. Rao, Jr. - vs. Maurice H. Nadjari et al.	75 Civil 2377	MacMahon	10-1-75
43175	Hawk Industries, Inc. et al. - vs. Baucus & Lomb Inc.	75 Civil 2376	MacMahon	10-1-75
43176	Wm. Hajo Wandschneider et al. - vs. Industrial Diacomex et al.	72 Civil 1177	MacMahon	10-1-75
43177	Lombino & Sons, Inc. et al. - vs. Standard Trust & Co.	67 Civil 1317	Palmieri	10-1-75
43178	Abraham Epstein - vs. Evans Products Company	72 Civil 1263	Motley	10-1-75
43179	In the Matter of Knit-Away, Inc. - vs. L.W. Foster & Whitcomb et al.	74 Civil 1642	Knapp	10-1-75
43180	Jesus Santiago - vs. Correctional Officer Shield #2464 et al.	75 Civil 2354	Stewart	10-2-75
43181	Michael Mc Elwitt - vs. Casper Weinberger	73 Civil 3084	Stewart	10-2-75
43182	Henry Nowacki - vs. American Maize-Products	74 Civil 3992	Stewart	10-2-75
43183	Jay Domes - vs. Kinevias U.S.A. Inc.	73 Civil 3410	Metzner	10-2-75
43184	Ronald Pilette - vs. New York City Employees	73 Civil 1128	Gurfein	10-2-75
43185	Clarence Fiein - vs. Abraham Beame	75 Civil 1364	Lasker	10-2-75
43186	Wesley Cobb et al. - vs. Abraham Beame et al. et al.	74 Civil 2530	Metzner	10-2-75
43187	Samuel Mathis et al. - vs. Federal Deposit Insurance Co.	75 Civil 3062	Pierce	10-2-75
		75 Civil 909	Pollack	10-2-75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated, : 73 Civ. 227 (LFM)

Plaintiff, :

-against- : REPLY AFFIDAVIT

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC., :

Defendants. :

- -x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN E. SMITH, being duly sworn deposes and says:

1. I am an attorney associated with the firm of Cleary, Gottlieb, Steen & Hamilton, attorneys for defendants Albert Fried, Jr. and Albert Fried & Co., and am the managing attorney of that firm.

2. As part of my responsibilities, I supervise the Managing Clerk's Department, consisting of a managing clerk and several assistant managing clerks. Part of the duties of this Department is to search the New York Law Journal every day marking those cases in which our office has an interest and in which trial motions or orders are pending. In addition, at least several times per week, one of the employees under my supervision checks both the opinion book and the docket sheets in the office of the Clerk of this Court for orders and decisions relating to cases in which this firm has appeared.

3. Our firm's docket sheet for this case reflects the fact that on or before October 1, 1975 we learned that this Court had entered an order by endorsement on defendants' motion to decertify this action as a class action.

4. Because we do not retain postcards received from the Clerk, I cannot say whether we received one in this instance. However, we noted in the October 1, 1975 edition of the New York Law Journal that this Court had entered the order at issue herein (at p. 24, col. 2). On October 1, 1975, we obtained from the Clerk's office a photostatic copy of the order.

5. Finally, it may be noted that the Court's memo endorsement is duly entered and quoted in full on the docket sheet maintained in the Clerk's office under date of September 29, 1975.

John E. Smith

Sworn to before me this
13th day of November, 1975

ROBERT L. SCHWEITZER
Notary Public, State of New York
No. 24-8881575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

November 13, 1975 Reply Affidavit of
Briscoe R. Smith in Support of
Motion to Decertify Action

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., et al.,

Defendants.

- -x

REPLY AFFIDAVIT

73 Civ. 227 (LFM)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BRISCOE R. SMITH, being duly sworn, says:

1. I submit this affidavit in response to the affidavit of Melvyn I. Weiss dated November 6, 1975.

2. Mr. Weiss' affidavit mischaracterizes this motion as a "motion to dismiss the complaint." Defendants have not moved to dismiss Mr. Cutner's complaint, but have moved to decertify the action as a class action, and to strike the class action allegations from the complaint.

3. Defendants first moved to decertify this action as a class action on August 1, 1975. One would have thought that plaintiff and his counsel would have responded to this challenge to their ability to represent the class by immediately taking steps to notify the class, as directed by the Court. Instead, plaintiff and his counsel did absolutely nothing to pursue the action on the merits but only sought to protect their status as

the class representatives. Indeed, it was not until defendants renewed their motion (at the expiration of the thirty-day reprieve granted by this Court) that plaintiff thought to notice defendants' depositions.

4. Plaintiff's counsel submits that no party will be prejudiced by his delay in commencing discovery. Prejudice, however, is not the issue on this motion. The only question is plaintiff's and his counsel's right to continue representing approximately 1,000 absent class members. Their failure to immediately commence prosecuting this action and to comply with this Court's order dated September 29, 1975, for whatever reason, is a further demonstration of their neglect of the class and compelling evidence of their inadequacy.

5. As an explanation for his failure to prosecute the action, plaintiff's counsel submits that this Court's order denying defendants' motion without prejudice "to renew within thirty days" upon a showing that plaintiff failed to prosecute the action diligently was not entered in the opinion book and that he received no postcard advising him of its entry. The inference is that there was an error in the Clerk's office. Such was not the case.

6. The affidavit of Steven Kroleski, submitted herewith, establishes that the order was entered on the docket sheet, that a postcard was mailed to Milbank, Tweed, Hadley & McCloy by the Clerk of the Court advising of its entry, and that notice of the order was printed in the New York Law Journal on October 1, 1975. Had plaintiff's counsel examined the docket sheet instead of the opinion book, or reviewed the Law Journal, he would have been apprised of the order.

7. The affidavit of John E. Smith, submitted on behalf of Cleary, Gottlieb, Steen & Hamilton, corroborates the fact that notice of the order's entry was available to anyone who reviewed the Law Journal or examined the docket sheet.

8. For these reasons, defendants request an order decertifying the action as a class action and striking the class action allegations from the complaint.

Briscoe R. Smith

Sworn to before me this
13th day of November, 1975.

Frieda Traystman

FRIEDA TRAYSTMAN
NOTARY PUBLIC, State of New York
No. 31-4014972
Qualified in New York County
Commission Expires March 30, 1977

November 13, 1975 Affidavit of
Steven L. Kroleski in Support of
Motion to Decertify Action,
Together with Attachments

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

CLYDE H. CUTNER, Individually and on behalf of all others similarly situated,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

- x

AFFIDAVIT

Index No. 73 Civ. 227 LFM

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEVEN L. KROLESKI, being duly sworn, deposes and says:

I am a law clerk with Milbank, Tweed, Hadley & McCloy.

On September 30, 1975 I obtained a copy of the memo endorsement and order, dated and filed September 29, 1975, denying defendants' motion to decertify the action as a class suit, by xeroxing the original document then in the file with Judge MacMahon's unit clerk, located on the 5th floor of the U.S. Courthouse, 40 Centre Street, New York, New York.

On November 6, 1975 I examined the docket sheet (Exhibit A) which is also kept with Judge MacMahon's unit clerk and ascertained that the "memo endorsement and order" entry was timely made. Furthermore, Milbank, Tweed, Hadley & McCloy received a postcard (Exhibit B), from the clerk of the court of the Southern District of New York advising that such an order

was entered on the action's docket sheet on September 29, 1975.

On October 1, 1975, at page 24 of the New York Law Journal (Exhibit C), a decision in this action is reported under Judge MacMahon's decisions as "see memorandum and order signed."

Sworn to before me this
13th day of November, 1975.

Frederick J Pomerantz

FREDERICK J. POMERANTZ
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1977

-75 Filed deft (N.Y. Stock Exchange) affdvt & notice of motion to decertify the action as a class action. Ret. 8-1-75

-75 Filed defts memo in support of motion to decertify action & strike class action allegations from the complt.

Filed stip & Order adjourning to 8-15-75 defts motion to decertify action as a class action. Pltffs papers in answer to be served by 8-6-75 & defts reply papers served by 8-14-75.....MAC MAHON,J

-75 Filed pltffs affdvt in opposition to defts motion decertifying action as a class action.

75 Filed Deft. NY Stock Exc's reply affdvt in supportof motion to decertify Class Action.

-75 Filed Memo-End on motion of 7-17-75. The within motion is denied without prejudice to renew within 30 days upon a showing that, in the interim, pltff has failed to take steps to prosecute this suit diligently.....So Ordered, MAC MAHON,J m/n

0-75 Filed deft (Stock Exchange) affdvt & notice of motion to decertify action as a class action. Ret. 11-14-75

0-75 Filed defts memo of law in support of motion to decertify action & strike class action allegations from the complt.

1-75 Filed pltffs notice to take deposition of defts (Albert Fried, Albert Fried & Co., & N.Y.Stock Exchange).

CLERK'S OFFICE
United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

Cutrin

vs.

Fried

} Civil Action No. 73 - 227 f-741

There was entered on the docket Sept. 29, 1975
an order (~~judgment~~) Rem. - Ended

A.O. NO. 145 Raymond F. Burghardt, CLERK

CLERK'S OFFICE
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OFFICIAL BUSINESS

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UNITED STATES COURTS

Milbank Tweed Hadley
& McCloy
Chase Manhattan Plaza
New York, N.Y.
10005

Mr. Wolf

NEW YORK LAW JOURNAL—Wednesday, October 1, 1975

24

Judge MacMahon
Cutner v. Fried See memorandum and order signed

Memorandum and Order Decertifying Class Action and Directing Plaintiff to Serve and File Amended Complaint

Memo Decision

Copy

#13441

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE CUTNER,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE,

Defendants.

73 Civ. 227-LFM

MEMORANDUM

MacMAHON, District Judge.

Defendants move for an order decertifying this action as a class action on the ground that plaintiff has unreasonably failed to represent adequately the absent members of the class.

The factual background of this suit, which was commenced on January 12, 1973, has been set out in this court's opinion, dated March 13, 1974, determining that this action should proceed as a class action. On April 8, 1974, we approved a form of notice to be given to the class members and ordered that plaintiff "promptly submit

to the Court recommendations regarding the method by which class members shall be identified and the mailing of notice effectuated." No such recommendations have been submitted, and no notice has been sent to the class members. In fact, plaintiff has done nothing at all to prosecute this suit since the class action determination was made more than 18 months ago.

We denied defendants' initial motion to decertify the class, by order dated September 29, 1975, "without prejudice to renew within 30 days upon a showing that, in the interim, plaintiff has failed to take steps to prosecute this suit diligently." Defendants have now renewed the motion. Plaintiff's counsel has responded by claiming that the reason he has failed to act within 30 days was that he was not aware of our order of September 29, 1975. However, that order was properly docketed, and notice of the order was duly published in the New York Law Journal on October 1, 1975. Thus, although we gave plaintiff a second chance to proceed with the suit, he has inexcusably failed to do so. This failure serves to emphasize plaintiff's total lack of concern with diligent prosecution of this action.

"It need hardly be mentioned that an important factor to be considered when determining whether an action should proceed as a class action is whether plaintiff will fairly and adequately represent the class. Rule 23(a)(4), Fed.R.Civ.P. In Murray v. First Republic Corp. of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968), it was stated that "the primary criterion is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process." The test that has been applied is that the "party's attorney be qualified, experienced, and generally able to conduct the proposed litigation." Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968). When we granted class action status in this case, we felt that this requirement had been satisfied.

Rule 23(c)(1), Fed.R.Civ.P., provides that an order determining that an action should be maintained as a class action "may be altered or amended before the decision on the merits." The Supplementary Note of the Advisory Committee with respect to Rule 23(c)(1) states:

"A determination once made can be altered or amended before decision on the merits if, upon fuller development of the facts, the original determination appears unsound." This is such a case.

Plaintiff and his counsel, by their inexcusable neglect and delay, have demonstrated that they are either unwilling or unable to fulfill their fiduciary duty to represent absent class members. Our finding on the motion to certify the class, that plaintiff met the test in Eisen, supra, has now been shown to be unfounded and unsound.

Accordingly, defendants' motion for an order, pursuant to Rule 23(c)(1), Fed.R.Civ.P., determining that this action should no longer proceed as a class action, is granted. Furthermore, all class action allegations shall be stricken from the complaint, and this action shall continue solely on behalf of the named plaintiff individually. Plaintiff is directed to serve and file an amended complaint, consistent with the foregoing, within 20 days. SO ORDERED.

Dated: New York, N. Y.
November 24, 1975

Lloyd F. MacMahon

LLOYD F. MacMAHON
United States District Judge

Notice of Motion for an Order Permitting Late Filing of an Amended Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER,

Plaintiff,

- against -

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

73 Civ. 227 (LFM)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Jerome M. Congress, sworn to February 27, 1976, the undersigned will move this Court before the Honorable Lloyd F. MacMahon in Room 2704, United States Court House, Foley Square, New York, New York 10007, on March 12, 1975, at 2:15 P.M. or as soon thereafter as counsel can be heard, for an Order permitting a late filing of an Amended Complaint herein on the grounds that such late filing will in no way prejudice defendants and will protect substantial rights of plaintiff.

Dated: New York, New York
March 1, 1976

MILBERG & WEISS

BY _____
A Member of the Firm
One Pennsylvania Plaza
New York, New York 10001
(212) 594-5300
Attorneys for Plaintiff

TO:

Milbank Tweed Hadley & MacCloy
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

Affidavit of Jerome M. Congress in Support of Motion to File an Amended Complaint, Together with Attachments

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

73 Civ. 227 (LFM)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JEROME M. CONGRESS, being duly sworn, deposes and says:

1. I am associated with Milberg & Weiss, attorneys for plaintiff in the above action. I submit this affidavit in support of plaintiff's motion for permission to make a late filing of the Amended Complaint herein.

2. In its Memorandum dated November 24, 1975, this Court determined that this action should no longer proceed as a class action and ordered that plaintiff serve and file an Amended Complaint within 20 days striking all class action allegations from the Complaint. Counsel for plaintiff subsequently considered appealing from the Order decertifying the class, and evaluated the status of the case. In the course of such evaluation, plaintiff inadvertently failed to meet the 20 day time period set forth in the Court's Order.

3. On February 3, 1976 plaintiff served an Amended Complaint consistent with the requirements of the Court's Order that class action allegations be stricken. The Clerk of the Court has, however, refused to file the Amended Complaint on the ground that the filing was not made within the 20 day limit. A copy of such proposed Amended Complaint is attached hereto as Exhibit A. Plaintiff's counsel then sought to obtain the consent of defendants to such late filing. Defendants refused to consent to the late filing, but nevertheless served Answers to the proposed Amended Complaint. Copies of such Answers are annexed hereto as Exhibits B and C.

4. Plaintiff submits that defendants have in no way been prejudiced by the timing of plaintiff's service of the Amended Complaint and that the interests of justice support plaintiff's motion for an Order relieving plaintiff from the 20-day time limit in the Court's November 24 Memorandum and allowing plaintiff to file the proposed Amended Complaint. As shown in the accompanying Memorandum of Law, a failure to file papers within the required time period should not result in the dismissal of an action in the absence of real prejudice to defendants where substantial rights are involved.

5. For the reasons given, plaintiff respectfully requests that the Court grant the instant motion.

JEROME M. CONGRESS

Sworn to before me this
day of March 1, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Plaintiff, - against - ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC., Defendants.	73 Civ. 227 (LFM) AMENDED COMPLAINT JURY TRIAL DEMANDED

Plaintiff, for his amended complaint, alleges as follows, on information and belief, except as to paragraphs 1 through 5.

Jurisdiction, Venue and Nature of Action

1. This Court has jurisdiction of this action under Section 27 of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, 15 U.S.C. §78aa, and 28 U.S.C. §§1332 and 1337.

2. Plaintiff brings this action under and pursuant to Sections 10(b) and 11(b) of the Exchange Act 15 U.S.C. §78j(b) and 78k(b), Rules 10b-5 and 11b-1 of the Securities and Exchange Commission promulgated thereunder, and Rule 104 of the New York Stock Exchange.

3. The matter is controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of costs and interest.

4. Venue is proper in this judicial district under Section 27 of the Exchange Act, 15 U.S.C. §78aa and 28 U.S.C. §§1391(b) and (d).

5. Plaintiff Clyde H. Cutner is a citizen of the Commonwealth of Pennsylvania residing at 226 South Rittenhouse

Square, Philadelphia, Pennsylvania, and on December 22, 1972, was the beneficial and record owner of 4100 and 3400 shares, respectively, of Skyline Corporation.

6. Defendant Albert Fried, Jr. (hereinafter "Fried") is a citizen of the State of New York, engaged in business as a stockbroker at 91 Hudson Street, New York, New York, is a member of the New York Stock Exchange, and is registered therewith as a "Specialist" in Skyline Corporation market trading.

7. A "registered specialist" is one authorized by a national stock exchange with which he is registered to perform two basic functions with respect to his specialty stock: As a broker, he executes orders forwarded to him by other exchange members, which are noted in his specialist "book" and for which he receives a part of the total commission paid by customers for the execution of their orders. As a dealer, he buys and sells for his own account for the purpose of providing reasonable price continuity from transaction to transaction by evening out temporary disparities between public supply and demand.

8. Defendant Albert Fried & Co. (hereinafter "Fried Company"), a stock brokerage firm with its principal place of business at 91 Hudson Street, New York, New York, employs defendant Fried in his capacity as Specialist and is the firm specializing in Skyline Corporation market trading on the New York Stock Exchange.

9. Defendant New York Stock Exchange (hereinafter "NYSE") is a New York not-for-profit corporation and is a "registered national securities exchange" as defined by §6(d) of the Securities Exchange Act of 1934, 15 U.S.C. §78f(d), with its principal place of business at 11 Wall Street, New York, New York.

10. Skyline Corporation is a corporation engaged in the business of manufacturing and selling mobile homes and related products. Its shares are listed and traded on the NYSE.

11. Defendants, in connection with the unlawful acts, conduct and conspiracy charged herein, directly or indirectly, used the means and instrumentalities of interstate commerce and of the mails and the facilities of a national stock exchange.

COUNT I

12. Shares in Skyline Corporation were traded on defendant NYSE throughout 1972 until December 22, 1972, at prices varying between a high of $74 and a low of $41 1/2 per share.

13. At all relevant times, Skyline Corporation has been and remains a financially sound corporation making a quality product, with good prospects for the future.

14. During the course of the morning of December 22, 1972, approximately 8,100 shares in Skyline Corporation were traded at approximately $48 per share.

15. At noon on December 22, 1972, a report of quarterly earnings by Skyline Corporation was published nationally on news wire services which showed earnings per share down slightly from the previous year for the quarter, but up slightly for the half-year.

16. With no further shares having been traded, at 12:11 p.m. on December 22, 1972, defendants in collaberation with each other and in their respective official capacities, stopped further trading in shares of Skyline Corporation.

17. The aforesaid closing of trading in such shares was done by defendants without justification and in breach of their duties imposed by the Exchange Act and the Regulations thereunder.

18. No further trading in shares of Skyline Corporation was permitted by defendants until 1:10 p.m. Tuesday, December 26, 1972.

19. During the period from noon December 22, 1972 to 1:10 p.m. December 26, 1972, defendant Fried, the agents and employees of defendants Fried and Fried Company, the Floor Governor andBoard of Governors and other agents and/or officials of defendant NYSE, and all of them, conspired to and did engage in acts, transactions, practices and courses of business which operated as a fraud and deceit upon plaintiff, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading to plaintiff, utilizing the facilities of defendant NYSE, the national wire service and other instrumentalities of Interstate Commerce in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as is more fully set forth below.

20. In connection with the stopping of trading on December 22, 1972, defendants, each of whom is sued both individually and as a co-conspirator, falsely represented that the influx of sell orders was of such volume as to necessitate closing the said market, which representation was untrue and operated as a fraud and deceit upon the shareholders of Skyline Corporation.

21. The act of stopping trading in the said shares operated as a fraud and deceipt upon plaintiff and the class in that that act operated as a false and misleading representation that the value of shares had been substantially reduced as a result of lower quarterly earnings.

22. Defendants conspired to and did falsely represent and state to the public, utilizing the facilities of defendant NYSE, interstate news wire services, and various newspapers and reports mailed interstate, that the fair market value of shares in Skyline Corporation had been reduced by $14 and that the true sale price for its shares was $34.

23. In fact, defendants Fried and Fried Company had orders on their books to buy at substantially higher prices.

24. The act of resuming trading in Skyline Corporation shares at 1:10 p.m. December 26, 1972, at a price of $34, operated as a fraud and deceit upon plaintiff and the plaintiff class in that it operated as a false and misleading representation that there had been sufficient time for the market to absorb, assess and recover from the implications and representations made by defendants in stopping trading, and further operated as a false and misleading representation that $34 was the highest price obtainable for the shares of Skyline Corporation.

25. Defendants conspired to and did omit to state the following material facts which were necessary in order to make the acts and statements of defendants not misleading to plaintiff:

(a) that at the time trading was halted, the Specialist's books carried buy orders at prices higher than

$34, which orders were not filled at prices higher than $34;

(b) that the alleged influx of sell orders was of much lesser volume than experienced on occasions when trading was not stopped;

(c) that the stopping of trading was due to the failure of defendants Fried and Fried Company to properly perform the duties imposed upon them as Specialist and was not due to emergency conditions in the market or to material conditions intrinsic to Skyline;

(d) that only 75,000 Skyline shares were matched by the Specialist during the time in which trading was halted.

26. As a result of the aforesaid acts, conduct, combination and conspiracy, plaintiff has been forced to sell Skyline shares at a depressed price and, in order to retain his investments held in margin or maintenance accounts, has had to borrow money at interest and take money out of income producing accounts and investments. Plaintiff has thereby been damaged in an amount in excess of $100,000.00.

COUNT II

27. Plaintiff incorporates by reference herein Paragraphs 1 through 25 hereof.

28. The aforesaid acts and practices by defendants had the purpose and effect of pegging or fixing the price for shares in Skyline Corporation substantially lower than the available market for Skyline Corporation shares.

29. The aforesaid stabilizing was itself a manipulative device and was initiated at the price of $34 by defendants at a time when defendants knew or had reason to know that the said price was the result of activity which

was fraudulent, manipulative and deceptive as above described, all in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

30. By virtue of the foregoing, plaintiff has been damaged as described in Paragraph 26 above.

COUNT III

31. Defendants in this Count are Fried and Fried Company.

32. Plaintiffs incorporate by reference herein Paragraphs 1 through 29 hereof.

33. The Rules of the NYSE, especially Rule 104, impose upon defendants as Specialists a duty to maintain a fair and orderly market and to minimize the effects of temporary disparities between supply and demand.

34. Defendants' actions, as above described, are in violation of the requirements of Rule 104 of the NYSE, were calculated to, and did, maximize the effects of any temporary disruption in supply of and demand for shares in Skyline Corporation.

35. By virtue of the foregoing, plaintiff has been damaged by Fried and Fried Company as described in Paragraph 26 above.

COUNT IV

36. Plaintiff incorporates by reference herein Paragraphs 3 through 35.

37. Jurisdiction is based upon diversity of citizenship and pendent jurisdiction. Venue is proper pursuant to 28 U.S.C. §§1391(b) and (d).

38. The aforesaid acts and conduct of defendants were negligent and grossly negligent.

39. By virtue of the foregoing, plaintiff has been damaged as described in Paragraph 26 above.

WHEREFORE, plaintiff demands judgment against defendants, jointly and severally, for all damages sustained by plaintiff, together with the costs of this action, reasonable attorneys fees, and such other and further relief as to the Court may seem proper.

Dated: New York, New York
January 30, 1976

Yours, etc.,

MILBERG & WEISS

By _____
A Member of the Firm

Attorneys for Plaintiff
One Pennsylvania Plaza
New York, New York 10001
(212) 594-5300

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Plaintiff, -against- ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, INC., Defendants.	:	73 Civ. 227 (LFM) ANSWER TO PROPOSED AMENDED COMPLAINT

Defendant New York Stock Exchange, Inc. (herein "NYSE"), by its attorneys, Milbank, Tweed, Hadley & McCloy, for its answer to the proposed amended complaint, served on February 3, 1976 (notwithstanding the Court's memorandum and order dated November 24, 1975):

1. Denies each and every allegation contained in paragraphs 1, 2, 3 and 4, except admits that jurisdiction and venue are alleged to exist by virtue of the designated statutes admits that the action purports to be brought under the designated statutes and rules and that the matter in controversy exceeds $10,000, exclusive of costs and interest.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5 and 6, except admits that Albert Fried, Jr. is a member of the NYSE and a registered "specialist" in Skyline Corporation (herein "Skyline").

3. Admits that the allegations contained in paragraph 7 provide a partial description of the role of a specialist and refers to the Rules of the Board of Directors of the NYSE for a more complete description of a specialist's activities.

4. Denies each and every allegation contained in paragraph 8, except admits that Albert Fried & Co. is a stock brokerage firm.

5. Denies each and every allegation contained in paragraph 11.

6. Admits, on information and belief, the allegations contained in paragraph 12.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

8. Denies each and every allegation contained in paragraph 14, except admits that approximately 8,100 shares of Skyline were traded on the floor of the NYSE on December 22, 1972.

9. Denies each and every allegation contained in paragraph 15, except admits that a report (or reports) of quarterly earnings of Skyline was or were published in one or more media shortly after noon on December 22, 1972, and refers to the report (or reports) for the content thereof.

10. Denies each and every allegation contained in paragraph 16, except admits that the NYSE halted trading in shares of Skyline at approximately 12:21 P.M. on December 22, 1972.

11. Denies each and every allegation contained in paragraph 17.

12. Denies each and every allegation contained in paragraph 18, except admits that trading in shares of Skyline was not resumed on the floor of the NYSE until 1:10 P.M. on the next business day following December 22, i.e., December 26, 1972.

13. Denies each and every allegation contained in paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 28, 29 and 30.

14. Denies each and every allegation contained in paragraph 33 and refers to the Rules of the Board of Directors

of the NYSE for a full and complete statement of their terms.

15. Denies each and every allegation contained in paragraphs 34 and 35.

16. Denies each and every allegation contained in paragraphs 37, 38 and 39, except admits that jurisdiction purports to be based upon diversity of citizenship and pendant jurisdiction and that venue is purportedly proper pursuant to the statute designated.

FIRST DEFENSE

17. The amended complaint was not timely served, as required by the Court's memorandum and order dated November 24, 1975.

SECOND DEFENSE

18. Counts I, II and IV fail to state a claim upon which relief can be granted.

WHEREFORE, defendant New York Stock Exchange, Inc. demands judgment dismissing the complaint, with costs and disbursements and reasonable attorneys' fees.

Dated: New York, N.Y.
February 17, 1976

MILBANK, TWEED, HADLEY & McCLOY

By _____
A Member of the Firm
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

CLYDE H. CUTNER,

Plaintiff,

-against-

ALBERT FRIED, JR.
ALBERT FRIED & CO.

and

THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

- - - - - - - - - - - - - - - - - - - -x

73 Civ. 227 (LFM)

ANSWER TO AMENDED COMPLAINT

ALBERT FRIED, JR. and ALBERT FRIED & CO., defendants, by their attorneys, Cleary, Gottlieb, Steen & Hamilton, answer the amended complaint ("complaint") herein (if it be permitted to be filed) as follows:

1. Admit the existence of the provisions of law cited in paragraphs 1 and 2 of the complaint, and deny each and every other allegation thereof.

2. Admit the allegations of paragraphs 9, 12 and 31 of the complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3, 5 and 13 of the complaint.

4. Deny each and every allegation of paragraph 4 of the complaint, except admit that if this Court has jurisdiction as alleged in paragraph 1 of the complaint, venue would be proper.

5. Admit the allegations of paragraph 6 of the complaint except deny that Albert Fried, Jr. ("Fried") is engaged in business at 91 Hudson Street and the implication that Fried is the only person registered with the New York Stock Exchange, Inc. ("NYSE") as a Specialist in Skyline Corporation ("Skyline") market trading.

6. Admit the allegations of paragraph 7 of the complaint, but only as a general statement and not as a legal or complete description of a Specialist.

7. Admit the allegations of paragraph 8 of the complaint, except deny that Albert Fried & Co. ("Fried Company") has its principal place of business at 91 Hudson Street and the implication that the firm, as such, specializes in Skyline market trading on the NYSE.

8. Admit the allegations of paragraph 10 of the complaint, except deny that they constitute a complete description of the business of Skyline.

9. Deny each and every allegation of paragraphs 11, 17, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 34, 35, 38 and 39 of the complaint.

10. Deny each and every allegation of paragraph 14 of the complaint except admit that approximately 8,100 shares of Skyline were traded on the floor of the NYSE on December 22, 1972 and allege that the shares were traded in a range of $49-7/8 to$47-1/2, which was the price of the last trade.

11. Deny each and every allegation of paragraph 15 of the complaint except admit that a report (or reports)

of quarterly earnings of Skyline was published in one or more media shortly after noon on December 22, 1972, and refer to the report (or reports) for the content thereof.

12. Admit that trading in shares of Skyline was stopped shortly after noon on December 22, 1972 on the NYSE, and deny each and every other allegation of paragraph 16.

13. Admit that trading in shares of Skyline on the NYSE was not resumed until 1:10 P.M. on December 26, 1972 (the next business day following December 22), and deny each and every other allegation of paragraph 18 of the complaint.

14. With respect to the allegations of paragraph 27 of the complaint, defendants repeat, reallege and incorporate herein by reference their answers to paragraphs 1 through 25 of the complaint.

15. With respect to the allegations of paragraph 32 of the complaint, defendants repeat, reallege and incorporate herein by reference their answers to paragraphs 1 through 29 of the complaint.

16. Deny the allegations of paragraph 33 of the complaint and refer instead to the text of Rule 104 of the NYSE and to the text of whatever other Rules of the NYSE plaintiff may have reference to for the content thereof.

17. With respect to the allegations of paragraph 36 of the complaint, defendants repeat, reallege and incorporate herein by reference their answers to paragraphs 3 through 35.

18. With respect to the allegations of paragraph 37 of the complaint, deny knowledge or information sufficient

to form a belief as to the existence of diversity of citizenship or pendent jurisdiction and deny that venue is proper, except admit that if this Court has jurisdiction, venue would be proper.

FIRST AFFIRMATIVE DEFENSE

19. The complaint fails to state a claim against Fried or Fried Company upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

20. Fried and Fried Company acted in good faith and in conformity with all applicable Federal laws and rules and regulations of the Securities and Exchange Commission and the NYSE, and the complained of cessation and resumption of trading, and all of defendants' acts related thereto, were duly approved by the NYSE and its duly authorized officers and agents in accordance with said laws, rules and regulations.

THIRD AFFIRMATIVE DEFENSE

21. The complaint and the untimely service thereof are not in compliance with the order of this Court of November 25, 1975 and said pleading is therefore a nullity.

WHEREFORE, defendants Albert Fried, Jr. and Albert Fried & Co. demand judgment dismissing the complaint, together with their costs and disbursements.

Dated: New York, New York
February 17, 1976

CLEARY, GOTTLIEB, STEEN & HAMILTON

By _____
A Member of the Firm
Attorneys for Albert Fried, Jr.
and Albert Fried & Co.

Plaintiff's Memorandum of Law
in Support of Motion for
Permission to File Amended Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

CLYDE H. CUTNER,

Plaintiff,

- against -

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

----------x

73 Civ. 227 (LFM)

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
PERMISSION TO FILE AMENDED COMPLAINT

In its Memorandum dated November 24, 1975, this Court determined that this action should no longer proceed as a class action and ordered that plaintiff serve and file an Amended Complaint within 20 days striking all class action allegations from the Complaint. Counsel for plaintiff subsequently considered appealing from the Order decertifying the class, and evaluated the status of the case. In the course of such evaluation, plaintiff inadvertently failed to meet the 20 day time period set forth in the Court's Order.

On February 3, 1976 plaintiff served an Amended Complaint consistent with the requirements of the Court's Order that class action allegations be stricken. The Clerk of the Court has, however, refused to file the Amended Complaint on the ground that the filing was not made within

3-1-76

the 20 day limit. Plaintiff's counsel then sought to obtain the consent of defendants to such late filing. Defendants refused to consent to the late filing, but nevertheless served Answers to the proposed Amended Complaint.

Defendants have in no way been prejudiced by the timing of plaintiff's service of the Amended Complaint and the interests of justice support plaintiff's motion for an Order relieving plaintiff from the 20-day time limit in the Court's November 24 Memorandum and allowing plaintiff to file the proposed Amended Complaint. In numerous cases the Courts have held that failure to meet a Court-imposed deadline should not result in a litigant's loss of his day in Court where substantial rights are involved and the opposing parties have suffered no prejudice, E.g., Avalon v. Greencha Holding Corp., 232 F.2d 129 (2nd Cir. 1956); Phillips v. Employers Mutual Life Insurance Co., 239 F.2d 79,80 (fn. 2) (5th Cir. 1956); McGrath v. Nolan, 83 F.2d 746,751 (9th Cir. 1936). Thus it is proper for a Court to vacate a prior order dismissing an action for failure to meet a schedule established by the Court when the interests of justice so required. E.g., Cavalliotis v. Salomon, 357 F.2d 157 (2nd Cir. 1966).

Plaintiff submits that under the standards set forth in the above cases, it is appropriate for the Court to grant plaintiff's motion for permission to file the Amended Complaint.

CONCLUSION

In light of the foregoing, plaintiff respectfully requests that the Court grant its motion for permission to file the Amended Complaint.

Dated: New York, New York
March 1, 1976

Respectfully submitted,

MILBERG & WEISS

BY _____

One Pennsylvania Plaza
New York, New York 10001
(212) 594-5300
Attorneys for Plaintiff

Of Counsel:

Melvyn I. Weiss
Jerome M. Congress

Affidavit of George J. Grumbach, Jr.
in Opposition to Motion to
File Amended Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Plaintiff, -against-	:	73 Civ. 227 (LFM)
ALBERT FRIED, JR., ALBERT FRIED & CO. and THE NEW YORK STOCK EXCHANGE, Defendants.	:	AFFIDAVIT IN OPPOSITION TO MOTION TO FILE AMENDED COMPLAINT

GEORGE J. GRUMBACH, JR., being duly sworn deposes and says:

1. I am a member of Cleary, Gottlieb, Steen & Hamilton, attorneys for Albert Fried, Jr. and Albert Fried & Co., defendants in this action. I am familiar with the proceedings in this action and submit this affidavit in opposition to plaintiff's motion for an order permitting the late filing of an amended complaint.

2. By Notice of Motion dated July 16, 1975, defendants moved to decertify this action as a class action on the ground that plaintiff was an inadequate representative of the class because of his failure to prosecute the action. By endorsed order dated September 29, 1975, this Court denied that motion without prejudice to renewal within thirty days upon a showing that in the interim plaintiff had failed to take steps to prosecute the suit diligently. No such steps having been taken within the time allowed by this Court, defendants renewed their motion on October 29, 1975.

3. In its decision and order dated November 24 and filed November 25, 1975, this Court granted defendants' renewed motion to decertify the class action. In its memorandum, the Court observed:

> "In fact, plaintiff has done nothing at all to prosecute this suit since the class action determination was made more than 18 months ago.
>
> * * *
>
> Thus, although we gave plaintiff a second chance to proceed with the suit, he has inexcusably failed to do so. This failure serves to emphasize plaintiff's total lack of concern with diligent prosecution of this action." (p. 2)

At the same time, the Court ordered plaintiff to serve and file an amended complaint within 20 days, i.e, by December 15, 1975, deleting class action allegations. (id., p. 4) Until February 3, 1976, plaintiff made no attempt to do so.

4. Upon receipt of defendants' renewed motion to decertify the action, plaintiff noticed defendants' depositions, its first discovery since interrogatories and a document request in March 1973. On November 20, 1975, plaintiff in fact took the deposition of Albert Fried & Co. and Albert Fried, Jr., by Albert Fried, Jr. To date, however, plaintiff has not submitted the transcript to Mr. Fried for his review, correction, signature and notarization. The deposition plaintiff noticed of The New York Stock Exchange, Inc. was adjourned without date, and to the present time, plaintiff has not sought to take that deposition.

5. The only other recent activity whatsoever of which I am aware in this case by plaintiff is his counsel's request to me in November 1975 to recopy certain documents

previously provided to plaintiff years before, which h[illegible] apparently been misplaced.

6. In summary, apart from proceedings involving class action certification and, subsequently, decertification, all that plaintiff has done in the prosecution of this action has been to serve interrogatories and a Rule 34 request three years ago, in March 1973, to take one deposition in November 1975 and to have some documents recopied.

7. In light of plaintiff's continuing failure to prosecute this action and his failure to comply with this Court's order to file an amended complaint for over two and one-half months after the deadline, it is submitted that plaintiff's motion to do so now should be denied.

S/
George J. Grumbach, Jr.

Sworn to before me
this 8th day of March, 1976

Notary Public

[illegible]
Qualified in [illegible] County
Certificate filed in New York County
Commission expires March 30, 1978

Defendants' Memorandum
in Opposition to Plaintiff's Motion
to File Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Plaintiff,	:	
-against-	:	73 C. 227 (L.F.M.)
ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC., Defendants.	:	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT

MILBANK, TWEED, HADLEY & McCLOY
1 CHASE MANHATTAN PLAZA
NEW YORK, N. Y. 10005
212-422-2660

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER, Plaintiff, -against- ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC., Defendants.	:	73 Civ. 227 (L.F.M.)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT

A brief review of the course of this litigation, now more than three years old, is found in Affidavit in Opposition of George J. Grumbach, Jr., submitted herewith. That review puts plaintiff's motion to permit the late filing of an amended complaint in proper perspective.

Plaintiff commenced this action in January, 1973 and the Court granted class action status in its opinion of March 13, 1974 (reported at 373 F.Supp. 4).

The Court there ordered plaintiff to submit recommendations promptly as to the identification of class members and the mailing of notice. But plaintiff never complied

with this order. Instead he let the class action lie dormant for eighteen months, during which time there was no effort to advance the claims on the merits.

Defendants' initial motion to "decertify" plaintiff as a class representative on the ground of his failure adequately to represent the class interests entrusted to him was denied on September 29, 1975 without prejudice to renewal within 30 days upon a showing that plaintiff failed to take steps to prosecute the suit diligently in the interim. When plaintiff failed to comply with this order, this Court granted defendants' renewed motion to decertify rejecting the excuse offered by plaintiff's counsel that he was unaware of the September 29 order. At that point, the Court found that plaintiff's failure to utilize this second chance to proceed was "inexcusable" and "serve[d] to emphasize plaintiff's total lack of concern with diligent prosecution of this action." Plaintiff and his counsel had demonstrated their unwillingness or inability to fulfill their fiduciary duties to absent class members, exhibiting "inexcusable neglect and delay."

In its decision on the class action issue, the Court directed plaintiff to serve and file an amended complaint striking all class action allegations within 20 days. Yet plaintiff failed to accomplish this routine task for 71 days. The Clerk rejected plaintiff's attempted filing as untimely.

Plaintiff once again is before the Court to excuse his astonishing indifference to the Court's order (for which

the only explanation is "inadvertence") requesting another opportunity to file an amended complaint.

PLAINTIFF'S MOTION
SHOULD BE DENIED

Rule 15(a) of the Federal Rules provides that leave to amend a pleading is to be freely given "when justice so requires." But it is well established that undue delay is a valid ground for denying leave to amend. See Vine v. Beneficial Finance Co., 374 F.2d 627, 637 (2d Cir.), cert. denied, 389 U.S. 970 (1967); Stiegele v. J.M. Moore Import-Export Co., 312 F.2d 588, 593-95 (2d Cir. 1963). And, many cases demonstrate that a litigant who engages in a course of long and neglectful procrastination will not be permitted to go forward forever even absent any showing of actual prejudice to the adversary. See, e.g., Theadoropoulos v. Thompson-Starrett Co., 418 F.2d 350, 353-54 (2d Cir. 1969), cert. denied, 398 U.S. 905 (1970); West v. Gilbert, 361 F.2d 314 (2d Cir.), cert denied, 385 U.S. 919 (1966); Klein v. Spear, Leeds & Kellogg, 65 F.R.D. 406, 409 (S.D.N.Y. 1974). As the Court of Appeals remarked in West v. Gilbert, supra, 361 F.2d at 316, where it affirmed a sua sponte dismissal for failure to prosecute, after substantial discovery, a case about as stale as this one: "The Court has frequently upheld the District Courts in their efforts to control the movement of the great volume of litigation on their calendars." The matter is left to the District Court's discretion, Link v.

Wabash R.R., 370 U.S. 626 (1962); Theilmann v. Rutland Hospital, Inc., 455 F.2d 853, 855 (2d Cir. 1972), and the "operative condition" is lack of due diligence on plaintiff's part, not a showing of prejudice to the defendant, Klein v. Spear, Leeds & Kellogg, supra, 65 F.R.D. at 410.

In John Birch Society v. National Broadcasting Co., 377 F.2d 194, 198 (2d Cir. 1967), the district court dismissed a libel complaint for want of a proper allegation of subject matter jurisdiction but granted plaintiff twenty days to file an amended complaint curing this deficiency. No amendment was offered nor was any application for an extension made within the period, and a week later the complaint was finally dismissed. Three weeks thereafter, plaintiff offered an amendment seeking to excuse it ntimeliness by reason of an alleged delay in the mail. Because no legitimate excuse for the delay was forthcoming, the Court of Appeals held that the district court did not abuse its discretion in denying leave to amend.

This failure to comply with a court-imposed time limit for amendment of pleadings has often led to striking of the complaint and dismissal. See, Agnew v. Moody, 330 F.2d 868 (9th Cir.), cert. denied, 379 U.S. 867 (1964) (civil rights plaintiff ordered to replead within twenty days; Trial Court's sua sponte dismissal after passage of two and a half months was not an abuse of discretion); Thompson v. Johnson, 253 F.2d 43 (D.C.Cir. 1958); Weiner v. City & County of Philadelphia, 184 F.Supp. 795 (E.D.Pa. 1960) (civil rights plaintiff ordered

to post security for costs within twenty days in default of which action would be dismissed; plaintiff missed the deadline and defendant's subsequent motion to dismiss was granted).

CONCLUSION

Plaintiff's motion should be denied and the action should accordingly be dismissed for failure to prosecute and to comply with the order of this Court pursuant to Rule 41(b) of the Federal Rules.

Respectfully submitted,

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

CLEARY, GOTTLIEB, STEEN & HAMILTON

By _____
(A Member of the Firm)
1 State Street Plaza
New York, N.Y. 10004
Attorneys for Defendants
Albert Fried, Jr. and
Albert Fried & Co.

Dated: March 9, 1976

Opinion and Order Denying Motion to File Amended Complaint and Dismissing Action with Prejudice for Failure to Prosecute and to Comply with Court's Order

6/18/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLYDE H. CUTNER,

Plaintiff,

-against-

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

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73 Civ. 227-LFM

OPINION

4463

APPEARANCES:

Milberg & Weiss
Attorneys for Plaintiff
One Pennsylvania Avenue
New York, N.Y. 10001
By: Melvyn I. Weiss and Jerome M. Congress, Esqs.

Cleary, Gottlieb, Steen & Hamilton
Attorneys for the Fried defendants.
One State Street Plaza
New York, N.Y. 10004
By: George J. Grumbach, Jr., Esq.

Milbank, Tweed, Hadley & McCloy
Attorneys for The New York Stock Exchange, Inc.
One Chase Manhattan Plaza
New York, N.Y. 10005
By: Briscoe R. Smith, Esq.

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MacMAHON, District Judge.

Plaintiff, Clyde H. Cutner, moves for an order permitting the late filing of an amended complaint in this action charging defendants with violations of the securities laws. The motion is denied and the action is dismissed with prejudice, pursuant to Rule 41(b), Fed. R.Civ.P., for failure to prosecute and to comply with the order of this court.

This action was originally commenced by the filing of a complaint on January 12, 1973, more than three years ago. The complaint, in the form of a class action, alleged various violations of the securities laws in connection with the suspension in trading by defendants of the stock of Skyline Corporation in December 1972.

Plaintiff moved for an order, pursuant to Rule 23, Fed.R.Civ.P., certifying this action as a class action, which was granted in an opinion dated March 13, 1974. On April 8, 1974, we approved a form of notice to be given to class members and ordered that plaintiff "promplty submit to the Court recommendations regarding the method by which class members shall be

identified and the mailing of notice effectuated." No such recommendations were submitted and plaintiff did nothing to prosecute the suit for more than a year.

Defendants moved, in July 1975, to decertify the class because of plaintiff's failure to proceed. Mindful that our primary duty was to protect the absent class members, we denied defendants' motion by order dated September 29, 1975 "without prejudice to renewal within 30 days upon a showing that, in the interim, plaintiff has failed to take steps to prosecute this suit diligently."

Plaintiff inexcusably failed to take advantage of this opportunity, and defendants renewed their motion. It became obvious to us that plaintiff was unfit to represent the members of the class, and on November 24, 1975 we filed a memorandum-decision and order decertifying this suit as a class action, citing "plaintiff's total lack of concern with the diligent prosecution of this action." Plaintiff was directed in that order to serve and file an amended complaint within 20 days, striking all class allegations, so that the suit could continue solely on his own behalf.

Plaintiff failed to comply with the time limit imposed. Rather, he attempted to file his amended complaint on February 3, 1976, more than two months after the November 24, 1975 order, but the Clerk justifiably refused to accept it as untimely. This resulted in the present motion, made March 2, 1976.

On oral argument of this motion, plaintiff's counsel was unable to offer any reasonable excuse for the flagrant neglect to comply with our order. It was asserted that plaintiff and his counsel had contemplated an appeal from the decertification of the class, and that the 20-day deadline was simply missed by "inadvertence." Thus, we are faced with an action, now pending more than 40 months, which is still in the pleading stages, due solely to plaintiff's inexcusable failure diligently to prosecute his claims and to comply with the duly issued orders of the court.

Mr. Justice Harlan, in Link v. Wabash R.R., 370 U.S. 626, 629-630 (1962), stated:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this

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> sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law . . . and dismissals for want of prosecution of bills of equity . . . ." (Footnotes omitted.)

Rule 41(b), Fed.R.Civ.P., recognizes the power of the trial court to dismiss an action for "failure of the plaintiff to prosecute or to comply with these rules or any order of court. . ." Such dismissal may occur either on motion of defendant or by the court sua sponte[1] and is committed to the sound discretion of the trial court.[2]

There are many examples of the exercise of this power. In Theodoropoulos v. Thompson-Starrett Co. 418 F.2d 350 (2d Cir. 1969), cert. denied, 398 U.S. 905 (1970), plaintiff, who had received an extension of time to file a note of issue, allowed the period to lapse, resulting in a dismissal of his complaint. The trial court vacated this dismissal on plaintiff's motion on condition that plaintiff file a note of issue within 15 days. Again, plaintiff permitted the time to lapse, and again the

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complaint was dismissed. Our Court of Appeals affirmed the dismissal, finding that the trial court had not abused its discretion and that it was a clear case of inexcusable neglect.

The same considerations apply in the present case. Our order directing the filing of the amended complaint within 20 days was clear and unequivocal.[3] Plaintiff cannot claim that he was unaware of the order, as his counsel admits that an appeal was contemplated. Nor did he make any request for an extension of time before the period had expired. And the record of this case, as noted above, demonstrates that plaintiff has been guilty of protracted delay occasioned only by his own inexcusable neglect.

Plaintiff asserts, however, that he should, nonetheless, be permitted to file his amended complaint since the defendants have not been prejudiced. Even if true, this assertion is unpersuasive since "/t/he operative condition of the Rule /41(b)/ is lack of due diligence on the part of the plaintiff--not a showing by the defendant that it will be prejudiced. . . ."[4]

A trial judge is entrusted by the public with the duty to see to the disposition of cases as promptly as the particular circumstances allow. To permit plaintiff to file his amended complaint when it pleases him to do so, especially in light of his unexcused noncompliance with the order of this court and the overall history of this action, would violate the public trust that we bear.

If litigants and their counsel do not heed the orders of the court, which are intended to facilitate the prompt and orderly disposition of civil cases, congested chaos in the court's calendar is the inevitable result. This chaos will necessarily affect the court's ability to control both its civil, and, more importantly, its criminal calendar. Rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act (18 U.S.C. §§ 3161 et seq.), and the Plan for Achieving Prompt Disposition of Criminal Cases of the Southern District, superimpose deadlines in all criminal cases, deadlines that cannot be met if the court's attempts to keep its civil cases on an orderly schedule are frustrated. It is high time that litigants and members of the bar learn that busy trial courts responsible

for the disposition of hundreds of cases do not issue orders for no purpose and that litigants who inexcusably disregard those orders must suffer the just consequences of their conduct.

Accordingly, plaintiff's motion for an order permitting the late filing of an amended complaint is denied. The action is hereby dismissed with prejudice, pursuant to Rule 41(b), Fed.R.Civ.P., for failure to prosecute and to comply with the order of this court.

So ordered.

Dated: New York, N. Y.
June 18, 1976

LLOYD F. MacMAHON
United States District Judge

FOOTNOTES

1 Link v. Wabash R.R., 370 U.S. 626 (1962).

2 See Link v. Wabash R.R., supra, 370 U.S. at 633; Theilmann v. Rutland Hospital, Inc., 455 F.2d 853, 855 (2d Cir. 1972); Theodoropoulos v. Thompson-Starrett Co., 418 F.2d 350 (2d Cir. 1969), cert. denied, 398 U.S. 905 (1970); 5 J. Moore, Federal Practice para. 41.11[27] at 1125 (2d ed. 1976).

3 We customarily state the overall disposition of a motion and all directions to counsel in the final paragraph of our memorandum-decisions to prevent any confusion as to what has been decided and what the parties are required to do. This was true of our November 24, 1975 order.

4 Klein v. Spear, Leeds & Kellogg, 65 F.R.D. 406, 410 (S.D.N.Y. 1974). See also Theodoropoulos v. Thompson-Starrett Co., supra, 418 F.2d at 353.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL SYLVESTER, being duly sworn, deposes and says:

That deponent is not a party to the action; is over the age of 18 years and resides at 621 Garner Place, East Meadow, New York.

That on the 9th day of September, 1976, deponent served the within Joint Appendix on the attorneys listed below by leaving a true copy thereof with the receptionist at each said firm:

Cleary Gottlieb Steen & Hamilton
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New York, New York 10005

Michael Sylvester
MICHAEL SYLVESTER

Sworn to before me this
9th day of September, 1976

Mae Eisenberg
Notary Public

MAE EISENBERG
Notary Public, State of New York
No. 30-4606174 Qual. in Nassau Co.
Cert. Filed in New York County
Commission Expires March 30, 1977